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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 398

HORSMAN DOLLS, INC.,
Plaintiff-Appellant,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Appellee

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Appellant contends that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Supreme Court of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 1257(2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> • • • • • • •

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. The statute of the State of New Jersey, the validity of which is involved, is New Jersey Revised Statutes Title 43: 21-6(b) as said statute existed in 1942. The aforesaid section of the statute involved appears on page 244 of Title 43, New Jersey Statutes Annotated. The section provides:

"(b) Initial determination. A representative designated by the executive director, and hereinafter referred to as a 'deputy', shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial or benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-

known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

3. The decision of the Supreme Court of New Jersey was rendered on June 25, 1951 and the judgment on said decision which is here sought to be reviewed was entered on the same day. The date upon which application for this appeal was presented was September 19, 1951.

(Reference hereinafter made to the record refers to the record as filed with the Supreme Court of New Jersey.)

4. The appellant is a subject employer under the New Jersey Unemployment Compensation Law, N. J. R. S. 43: 21-1 *et seq.* This statute was adopted in 1936. Under its provisions there was established an unemployment compensation fund to which employees and employers contributed. The statute provided that until 1942 the contribution rate of all employers was to be uniform but that rates fixed for the year 1942 and thereafter would be controlled by the past employment experience of each employer. An account was to be created in the Commission for each subject employer. This account was to be credited with contributions by the employers at the statutory rate and charged with benefits paid by the Commission to former employees who were entitled to benefit payments under the statutory provisions. The debits and credits to this account

were vital factors in determining the contribution rate to be assigned to the employer.

5. In July, 1942, the appellant was notified by the Commission that on the basis of its previous experience the Commission had fixed a rate of 2.7% of the annual payroll of the appellant as the contribution rate for 1942 (R. 269a). In January of 1943 the Commission notified the appellant that the 2.7% rate had been erroneously assigned and that instead, the rate applicable to the plaintiff for the year 1942 was 3.6% (R. 7a). This was the highest rate which the statute authorized. It was a penalty rate occasioned by the fact that the records of the Commission showed that the benefits paid to appellant's former employees substantially exceeded the sum contributed to the fund by the appellant.

6. The notice fixing the contribution rate advised the appellant that if it disagreed with the rate it should request a hearing, and the Commission sent to the appellant its form for use in order to obtain such a hearing (R. 10a). This form was completed as required and the Commission assigned the case to one of its referees for trial. Numerous hearings were held before the referee but before his decision was rendered the Commission withdrew the case to itself for decision. The validity of this removal was tested in the courts and finally sustained. Thereafter the Commission rendered a decision rejecting the plaintiff's petition for a redetermination of its rate. The case was then brought for review before the former Supreme Court of New Jersey on certiorari, the then prevailing procedure.

7. Before the Commission (R. 183a), and thereafter in the courts (R. 23a), the appellant pointed out that no provision was made in the statute for a hearing before the deputy of the Commission who was designated by the statute to find the facts and decide upon the validity of the claim for benefits. The appellant contended that in this respect

the statute was unconstitutional since the deputy made a decision in a quasi-judicial proceeding without giving the employer an opportunity to be heard. Appellant pointed out, however, that the statute did prescribe a method of affording the hearing required by due process by the provision that notice of the decision of the deputy was to be given to the employer. He could then take an appeal which would stay the payment of the benefits and thus procure a hearing on the validity of the claim. In that hearing on the appeal, the employee had the burden of proof in an adversary proceeding to establish his right to benefits.

8. The appellant contended that unless the statute were construed so as to require the deputy to notify it of the decision, the statute was unconstitutional because the payment of benefits without such notice to the employer deprived it of its right of appeal and denied it any opportunity to be heard before the benefits were paid and the charges assessed against its account. It was established during the hearing before the referee that no notice of any decision rendered by the deputy was ever sent to the appellant by the Commission. The Commission paid benefits to the former employees of the appellant without notifying the appellant that a decision had been made and that its account was being charged with the payments. Its property was thus taken without due process of law.

9. The Commission contended that the appellant was not entitled to notice of the decision under the statute because it was not "an interested party" within the statutory language describing those to whom notice of the decision should be sent. The Commission also contended that when claims for benefits were filed with it by former employees of the plaintiff, notice of the filing of the claims had been sent to the plaintiff where the plaintiff was the last employer of the claimant and the plaintiff failed to furnish

the Commission with any information indicating that the claimant was disqualified from benefits. The Commission contended that the failure of the plaintiff to respond to the notice of the filing of the claim for benefits estopped the plaintiff from raising the question that it was prejudiced by the failure of the deputy to send the plaintiff the notice of decision, the only notice which the statute provided.

10. In answer to this contention, the appellant submitted that the Commission had no right to substitute the notice that a claim had been filed in place of the statutory notice of decision, in view of the fact that the only right of appeal provided by statute was from the decision of the deputy. The appellant also pointed out that the notice of the filing of the claim which it received solicited information only as to disqualifying causes within the knowledge of the employer, and instructed the employer that no answer was necessary unless he knew of disqualifying causes (R. 276a). In view of the fact that under the statute there were many disqualifying causes not possibly within the knowledge of the employer, but ascertainable only upon the examination of the facts by the deputy, the failure of the employer to respond to the notice could not estop it from receiving its constitutional right to a timely hearing before the payments were made, as provided in the statute. This point was made in the dissenting opinion of the Supreme Court. In addition, the appellant pointed out that the Commission conceded that not even a notice of the filing of the claim was sent to the appellant by the Commission where the appellant was not the most recent employer of the claimant but was charged as an employer in the base year. As to these charges against its account the appellant had no notice whatsoever, even of the filing of the claim. Yet its account was charged for benefits paid.

11. The appeal was heard by the Appellate Division of the Superior Court of New Jersey which succeeded to the

jurisdiction of the former New Jersey Supreme Court after the change in the New Jersey court structure. The Appellate Division unanimously reversed the decision of the Unemployment Compensation Commission. It held that the statutory provision that notice of the decision on benefit payments was to be sent to the plaintiff could not be dispensed with by the Commission. The opinion of the Appellate Division is appended to this statement.

12. The case was then taken to the Supreme Court of New Jersey which granted certification upon application of the Commission. At the oral argument and re-argument of the appeal it was contended by the Commission and suggested by several members of the court that there was no requirement in the statute for any notice or opportunity for the plaintiff to be heard upon the validity of the benefit claim before the benefit payments were made or before the charges were assessed against the plaintiff's account. It was suggested by the court that a grammatical reading of the statute required the construction that notice of a decision need be given only in the case of a labor dispute. The plaintiff responded both orally and in its brief that if the court construed the statute so as to permit the Commission to dispense with the giving of notice of the decision to the appellant in any case where the appellant's account was charged, then the statute was unconstitutional as constituting a deprivation of the plaintiff's property without due process of law in violation of the Constitution of the United States. Under such a construction the plaintiff would never have an opportunity to be heard upon the merits of the claim because (1) no provision for a hearing prior to the deputy's decision was contained in the statute, and (2) the absence of a requirement that appellant receive notice of the decision deprived the appellant of its appeal and thus deprived it of the only opportunity to be heard which the statute provided.

13. In the Supreme Court of New Jersey, the Chief Justice and one associate justice disqualified themselves from sitting on the appeal. The remaining five justices by a vote of three to two reversed the decision of the Appellate Division. The affirmance of the action of the Unemployment Compensation Commission was, therefore, by a vote of a minority of the entire court. The majority opinion construed the statute as including the plaintiff in the category of persons entitled to notice of the decision. It said:

> "As respects 'the decision' to which the provision for notice has reference, and the significance of the phrase 'other interested party', subsection 6(b) is not free from ambiguity. But we shall resolve the doubt in favor of notice."

Notwithstanding this statement, however, the Supreme Court did not construe the provision for notice of the decision to be mandatory, for the court then held that the failure of the Commission to give this statutory notice did not constitute a denial of due process because, in the court's speculative view, even if the plaintiff had received the statutory notice of decision there would have been no appeal therefrom.

14. The dissenting opinion in the Supreme Court stressed the duty put by statute upon the deputy to find the facts and so determine the validity of the claim. It was emphasized that the claim for benefits could be invalid by many incidents which occurred after the worker had left the employer; as to these facts the employer could have no information. The dissenting justices concluded that the failure of the deputy to send the appellant notice of the decision on the claim deprived the appellant of its right of appeal. Both opinions of the Supreme Court of New Jersey are appended to this statement.

15. The Supreme Court of New Jersey has decided, however, that the notice of the filing of the claim for benefits sent to the employer, even though this notice was not provided for in the statute, was appropriate to satisfy the due process requirement of an opportunity to be heard, notwithstanding the fact that the statute required the deputy to send notice of his decision and conditioned the right of appeal upon this notice of decision. The effect of the decision is to sustain the constitutionality of the statute above quoted and the action of the Unemployment Compensation Commission thereunder.

16. The decisions which sustain the jurisdiction of the Supreme Court of the United States to review this case on appeal are: *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941); *Morgan* v. *U. S.,* 298 U. S. 468 (1936); *Morgan* v. *U. S.,* 304 U. S. 1 (1938); *Shields* v. *Utah Idaho Central Co.,* 305 U. S. 177 (1938); *Mullane* v. *Central Hanover B. & T. Co.,* 339 U. S. 306, (1950); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (1937); *Moser* v. *United States,* 95 L. Ed. 457, (1951); *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927); *Lawrence* v. *State Tax Commission,* 286 U. S. 276 (1932); *Abie State Bank* v. *Bryan,* 282 U. S. 765 (1931); *Ancient Egyptian Arabic Order N. M. S.* v. *Michaux,* 279 U. S. 737 (1929); *Ward* v. *Love County,* 253 U. S. 17 (1920).

17. The section of the statute in question requires the deputy of the Commission to investigate the claim, to make a finding of facts and to render his decision upon its validity. The effect of this decision of the deputy, if the claim for benefits is sustained, is to charge the amount of benefits paid against the employer or employers concerned. Generally the charge will be imposed against the last or most recent employer of the claimant. Where the duration of the employment of the claimant with his last employer is

short, however, a portion of the charge will be assessed against other former employers of the claimant. For this purpose the statute prescribes a "base year" consisting of the first 4 of the last 5 completed calendar quarters prior to the one-year period of eligibility for benefits.

18. The statute also prescribes a series of benefit eligibility conditions (N.J.R.S. 43: 21-4) and a series of causes which will disqualify claimants from benefits (N.J.R.S. 43:21-5). The eligibility conditions consist of the requirements that the individual register for work at, and report to, an employment office; that he makes the required claim for benefits; that he is able to work and is available for work; that he has been unemployed for two weeks, and that he has earned a certain amount of wages during the past year. The causes for disqualification are voluntary cessation from employment without good cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States.

19. There is no provision in the statute for a hearing by or before the deputy prior to his determination or decision that the claim is valid. Thus his examination of the claim and his finding of facts is made without any requirement by statute that notice be given to the employer concerned and without any opportunity to the employer to be heard before the decision upon the validity of the claim is made.

20. The action of the deputy in finding facts and rendering a decision is quasi-judicial under New Jersey law, *Penna. R. R. Co.* v. *N. J. State Aviation Com.*, 2 N. J. 64 (1949), and under the decisions of this court, *Morgan* v. *U. S.*, 298 U. S. 468 (1936). The failure of the statute to

provide for a hearing before the quasi-judicial determination is made thus constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

21. Had the Supreme Court of New Jersey construed the statute to make it mandatory upon the deputy to notify all employers of the decision and thus initiate the hearing on appeal, no deprivation of due process would have occurred because the employer would have received an opportunity to be heard at some level in the proceeding before the payment of the benefits, and before the charge against its account. This is the timely opportunity to be heard which due process requires. *Opp Cotton Mills, Inc.* v. *Administrator, supra.*

22. The appellant had a right to rely upon receiving the notice of the decision which the statute directed the deputy to send. Under the construction of the statute by the Supreme Court of New Jersey, the appellant was an "interested party" and thus entitled to notice of the decision. The statute gave to the employer 7 days within which to appeal the decision of the deputy or to acquiesce in the payment. The opportunity to be heard on the appeal which the statute thus afforded was of little worth unless the appellant knew that a decision had been rendered, since the right of appeal and the time for the employer to make its election as to what choice to pursue did not arise until notice of the decision was received. *Mullane* v. *Central Hanover B. & T. Co., supra.*

23. The Supreme Court of New Jersey held that the notice of the filing of the claim for benefits gave appellant an opportunity to be heard "at the outset". While the court recognized that this notice was "extra the statute and not of controlling force", it nevertheless held that the notice was "appropriate" to the requirements of due

process. This court has held that a notice not provided by statute cannot supply constitutional validity to the statute or service under it. *Wuchter* v. *Pizzutti, supra.* This rule is especially applicable where, as here, the statute specifically prescribes the form of notice which is to be given. Under such circumstances nothing is effective or appropriate under due process except that which the statute provides and that which the employer is entitled to anticipate. It cannot be said that estoppel has destroyed the fundamental right of the employer to a hearing where the estoppel is predicated upon a form used by the Commission outside the scope of the statute. This court will not presume acquiescence in the loss of fundamental rights. *Ohio Bell Teleph. Co.* v. *Public Utilities Com., supra.*

24. The dissenting opinion in the Supreme Court of New Jersey points out that in the early months of the operation under the statute, the Commission sent to employers a notice that a decision had been made. This procedure was thereafter abandoned by the Commission without any indication to the employer that he would no longer receive a comparable form giving notice of the decision in the statutory manner, or that notice of the decision would be dispensed with altogether. Similar misleading circumstances recently led this court to point out that a party must be properly informed before his choice of courses can be said to be intelligent and thus binding upon him. *Moser* v. *United States, supra.*

25. The Supreme Court of New Jersey held that the hearing before the referee in 1943 was an "adequate hearing in the administrative tribunal". This was not the statutory hearing to be held for each benefit claim. It was at this time that there was offered into evidence in the proceedings before the referee as an exhibit by the Commission a series of booklets containing information compiled by the Com-

mission for the purpose of the hearing. These booklets disclosed for the first time the various benefit payments which had been made by the Commission to the former employees of the plaintiff. The Supreme Court holds that the introduction of this document into evidence constituted notice to the appellant in 1943 of the payments of benefits years earlier and further, that the delay in the notice "merely delayed the time for appeal". The court expresses the view in a footnote to its opinion, that the decision of the deputy is not "final" until notification is given. This statement of the court ignores the statutory provision also quoted in the same footnote to the effect that the finality of the decision and the payments of benefits are concurrent events. The statute provides that when the notification is mailed, the decision "shall be final and benefits shall be paid or denied in accordance therewith". All of the benefits involved in this case were paid between 1939 and 1942, long before the hearings were held before the referee and long before the exhibit was introduced into evidence containing the data relating to the payments of benefits.

26. After its extended discussion on the constitutional questions raised and its decision that due process under the United States Constitution was satisfied by the statute and the Commission's action, the Supreme Court said that:

> "Laches and the doctrine of estoppel serve to bar the relief sought."

In its short statement on this point the court indicated that the estoppel existed in the failure of the appellant to make known to the Commission grounds of disqualification in response to the notice of the filing of the claim. This conduct is said by the court to have led the Commission to the belief that there were no grounds of disqualification and, therefore, to make payment of benefits. The Court con-

cluded that the statutory duty of the deputy to inquire into and find the facts was thus cancelled.

27. This attempt by the court to strengthen its opinion on constitutional issues by the inclusion of a non-Federal ground is unsubstantial and illusory. It cannot independently or adequately support that judgment. The appellant by presenting the substantial Federal questions already outlined may, therefore, invoke the jurisdiction of this court. *Lawrence* v. *State Tax Commission, supra; Abie State Bank* v. *Bryan, supra; Ancient Egyptian Arabic Order N. M. S.* v. *Michaux, supra; Ward* v. *Love County, supra.*

28. As is pointed out in the dissenting opinion, the record shows that when it received notice of the filing of the claim for benefits, the appellant knew of no disqualifying cause. Thus, even under the Commission's own procedure, the appellant had no reason to respond to the Commission's notice. But even if the appellant had advised the Commission that, to its knowledge, no reason existed to disqualify the claimant from benefits, the deputy would not have been justified in making the payments and charging the employer's account. Under the statute the validity of the claim for benefits did not depend upon the employer's knowledge of disqualifying causes. The employee was required to establish his eligibility and the deputy was required to investigate and find the facts. The failure of the claimant to satisfy any condition of eligibility or qualification necessitated a decision that his claim was invalid. Many of these conditions were ascertainable only by an examination of the facts by the deputy, in any event the employer could not be expected to know the circumstances which arose after the separation from employment or circumstances having no relation to the employment itself. This is pointed out in the dissenting opinion where it was contended by the minority justices that the construction of

the statute made by the majority imposed upon the employer the burden of doing that which the statute directed to be done by the Commission. The statements in the majority opinion that the appellant conceded that "all such benefit payments were valid" and that "it is undenied that the claimants had a lawful right to the benefits allowed" are completely unsupported by the record. This is shown in the dissenting opinion which said:

> "* * * That the employer had no adverse information to communicate did not signify that there were no disentitling facts or that the employer was not interested in being notified of the decision. I find no concession by the employer that the benefits in question were valid and properly allowed; the concession was that the employer's record did not disclose invalidation."

The very claim of the appellant that the statute was unconstitutional if construed by the court to deny the appellant notice of the decision of the deputy was made because the appellant never had an opportunity to be heard in a proceeding where the claimant for benefits was rquired to sustain the burden of establishing the validity of his claim. Statements of estoppel and laches which are thus predicated by the court upon the failure of the appellant to assume a burden imposed by statute upon the Commission are artificial and unsubstantial, and inadequate to support the judgment of the court.

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of New Jersey in this cause.

SAMUEL KAUFMAN,
Attorney for Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY

No. A-86, September Term, 1950

Horsmann Dolls, Inc., *Plaintiff-Respondent,*

v.

Unemployment Compensation Commission of New Jersey, *Defendant-Appellant*

Argued February 12, 1951; Reargued April 30 and May 7, 1951; Decided June 25, 1951

On Appeal From the Appellate Division of the Superior Court, Whose Opinion Is Reported in 9 N. J. Super. 101

Messrs. Herman D. Ringle and Morris M. Schnitzer argued the cause for appellant, Messrs. Theodore D. Parson, Attorney General, and Joseph A. Murphy, Assistant Deputy General, on the brief. Mr. Charles A. Malloy, Attorney.

Mr. Samuel Kaufman argued the cause for respondent. Messrs. Sanford Freedman and John M. Kaufman on the brief. Mr. Alexander Budson and Messrs. Bilder, Bilder & Kaufman, Attorneys.

Messrs. Bernard M. Shanley and Harold M. Fisher, for New Jersey State Chamber of Commerce, Messrs. William J. Egan and Thomas L. Parsonnet, for New Jersey Federation of Labor, and Mr. William H. Osborne, Jr., for Crucible Steel Company of America, by leave of court, submitted briefs as *amici curiae.*

The opinion of the court was delivered by

Heher, *J.:*

The subject of controversy here is the validity of the contribution rate assigned to the plaintiff employer for the year 1942 under R. S. 43:21-1, *et sec.*

The employers' rate of contribution to the fund created by this statute for the alleviation of economic insecurity

due to involuntary unemployment, by the maintenance of purchasing power during periods of unemployment, is based on benefit experience. Benefits paid out of the fund on the subject employer's behalf constitute a basic factor in the computation of the rate. Under subsections 7(c) (3) and (4) of the Act, the employer either retains his basic rate of 2.7% or is assigned a merit rate of 1.8% or 0.9% or a penalty rate of 3.6% depending on his employment experience. The excess of contributions by the employer over benefits paid, related to wages upon which contributions had been made during the experience period, determines the "reserve ratio" by which the merit rate is established Where the employer's contributions for the test period are less than the benefits charged against his account, the rate is 3.6%; where the reserve ratio is less than 7.5%, the rate is 2.7%; where the reserve ratio equals or exceeds 7.5% but is less than 10%, the rate is 1.8%; and where the reserve ratio equals or exceeds 10%, the rate is 0.9%.

The plaintiff employer's contribution rate for the years 1942 and 1943 was fixed by the defendant Commission at 3.6%. This was on the hypothesis that plaintiff's contributions during the experience period totalled $48,929.26, and the benefits paid amounted to $98,203.34. On this basis, the rate was properly fixed at 3.6%. But plaintiff protested that its account had been illegally charged with benefits paid, and petitioned for a hearing and a recomputation. On April 1, 1948, after hearing held, the Commission resolved the issue adversely to plaintiff. The Appellate Division reversed the determination for what was deemed to be failure of notice prescribed by subsection 6(b) of the Act. 9 N. J. Super. 101 (1950). The cause was certified here for appeal on the Commission's application.

The primary issue is whether there was a failure of decision and of notice directed by subsection 6(b) of the Act as it then was (c. 270 of the Session Laws of 1936) which constituted an impairment of plaintiff's substantial rights and compels a disallowance of all benefits paid to plaintiff's former employees in computing the experience or merit rate under the statutory formula, even though it is conceded that all such benefit payments were valid and were made pursu-

ant to the Commission's peremptory duty in the fulfillment of the statutory public relief policy.

This was the procedure followed by the Commission during the period in question: The initial claim for benefits filed with the Commission by the employee detached from service was checked against all pertinent record data and information in the possession of the Commission; and when the examination revealed no ground for disputing the validity of the claim, there was dispatched to the employer Form B-11, entitled "Notice to Employer of Claim for Benefits," advising the employer of the making of the claim for benefits and that the "Wage records on file in this office indicate that said worker is eligible for such benefits," and "if you have any objections to payment of this claim, check the appropriate item in the adjoining column and return original copy within seven days from date" to the Commission at Trenton. The column questions were designed to elicit all possible grounds of ineligibility. And there was endorsed on the back of the notice a printed statement that its purpose was to discover "any facts that might disqualify the claimant or render him ineligible." Such was the unvaried practice in the case of the plaintiff employer. It is admitted that plaintiff received such notices; and there is no contention that any of the benefit payments in question were made without such prior notice. There was no response to any of the notices so given plaintiff, nor did plaintiff return any of the separation notices prescribed by the Commission's regulations, which called for an immediate statement by the employer of grounds for disqualification, related to the separation from employment, for the good and sufficient reason that the claimants were under no disqualification. This was acknowledged by Garnier, plaintiff's comptroller, who was in charge of all notices of claims for benefits and all matters relating to employment experience and the contribution rate chargeable to plaintiff. He testified that he "really paid no attention" to the notices B-11, because plaintiff's was "a seasonal business," the plant was "shut down January, February and March, and sometimes April," and "we had no employment; there was no objection I could make."

The witness acknowledged that he would have known if any of the claimants for benefits during this period was disqualified, and that he was aware at the time that many of the claimants, including his own son, were receiving weekly benefits, indicating that their claims for benefits had been allowed. It was then the Commission's practice to send a notice of the deputy's disposition of the claim for benefits only to employers who had responded to the notice B-11 or had given a separation notice in accordance with the Commission's regulations.

In June, 1942, plaintiff was given notice of its experience rate for the then current year, the rate now in controversy; and this was followed by the petition for a hearing. Shortly thereafter, plaintiff was given a breakdown of the benefit charges for the period in question, identifying its employee-recipients of benefits, and later on, November 1, 1943, plaintiff received a separate statement of each individual benefit claim for that period containing all the elements of an "initial determination" and the benefits paid on each claim. Except for a few isolated duplications corrected by the Commission itself, no proof was submitted or tendered by plaintiff tending to show that any of the claims were invalid and therefore not chargeable to its account. It is undenied that the claimants had a lawful right to the benefits allowed.

The contention is that the "decision" required by subsection 6(b) was not made with respect to the claims for benefits allowed and charged to plaintiff's account, and that plaintiff "was irretrievably prejudiced by the failure of the deputy to promptly notify it of the decision" made. It is said that this section laid upon the deputy the duty of an "initial determination" of "the validity of the claim, the commencement of the benefit period and its duration, and the weekly benefit amount," and that the failure of "timely notice" to the plaintiff employer of a "decision" definitive of these elements constituted a fatal deviation from the statute and a denied of due process of law in violation of the State Constitution and the Fourteenth Amendment to the Federal Constitution. It is argued on the brief that the statute requires that the initial determination be

followed by weekly determinations during the compensation period of the claimant's right to continued benefits and his eligibility for work; and on the oral argument it was vigorously contended that unless the statute be construed to require weekly decisions and notice thereof to the employer, it would constitute in this regard a denial of due process.

As respects the "decision" to which the provision for notice has reference, and the significance of the phrase "other interested party," subsection 6(b) is not free from ambiguity. But we shall resolve the doubt in favor of notice. In this view, the failure of notice to the plaintiff employer of the deputy's initial determination of the detached employee's eligibility for benefits did not result in substantial prejudice to plaintiff which demands that his account for rate purposes be disburdened of the benefits lawfully paid to the detached employee because of seasonal unemployment. The want of notice of the initial determination, however informal the decision, did not serve to deprive plaintiff of such remedy by appeal as the statute gave him, for plaintiff concedes that its failure to respond to the notices B-11 was the entire absence of grounds of disqualification. *Ergo,* there would not have been an appeal if notice of the determination had been given. As we have seen, there is no suggestion that any of the allowances for benefits here involved were unlawfully made, or were excessive in amount, or covered an undue period. There was no loss of a substantial right.

The disburdening of plaintiff's account of benefits thus lawfully paid would work serious detriment to the statutory policy of unemployment insurance without reparatory service to appellant. Administrative failures or deficiencies cannot be made to serve the interests of one whose substantial rights have not been thereby invaded. The statute does not say that, for the purpose of computing the employer's contribution rate, a failure of notice of the initial determination shall, in and of itself, work a disburdenment of the employer's account of the benefits lawfully paid; and the corollary is that the employer cannot invoke

the commission save as may be needed to repair the injury done to him. He may not resort to the default for his unjust enrichment. Here, there was notice to plaintiff of the claims for benefits and a demand that grounds of disqualification be made known. In the cited case of *Bell-Brook Dairies, Inc.* v. *Bryant*, 35 Cal. 404, 218 Pac. (2d) 1 (1950), there was no notice to the employer of the claims for benefits; and it was held that the failure of notice of the making of the claims "deprived plaintiff of the opportunity to defeat the claims by offering the claimants suitable employment," and "an opportunity to prevent the creation of the conditions giving rise to the tax or to show facts which might have established that the claimants were not entitled to benefits." But this is not so here. Plaintiff had notice of the claims, and failed to respond because of no known ground of disqualification.

But plaintiff says that the failure of prompt notice of the benefit allowances deprived it of the opportunity to provide employment and thereby to disqualify the claimants for benefits chargeable to its account, and to protect itself against disqualification arising subsequent to the initial award. The point is without substance. It conclusively appears that, because of the seasonal nature of the business, plaintiff could not provide employment during the benefit period. The layoff was an incident of the annually recurring season of unemployment then characteristic of the trade; and plaintiff well knew that its detached employees, with rare exceptions, would promptly receive benefits for the period prescribed by the law. Such is the purpose of employment security. And the notice of the initial determination would be of no avail in the discovery of after-occurring disqualifications. Recognition of this led to the contention on the oral argument that unless the statute be construed to require weekly determinations and notice to the employer, it would be violative of due process. The statute makes no such requirement; and its failure so to provide does not constitute a denial of the essence of procedural due process. Plaintiff was aware of the continuing benefit payments to its detached employees; and it knew disqualification by the provision of unemployment or

want of attachment to the labor market, or otherwise, would bear upon the merit rate.

Plaintiff had notice of the claims for benefits and an opportunity to be heard at the outset. If this be deemed *extra* the statute, and not of controlling force, it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account, not only when it was first apprised of the contribution rate in July, 1942, but later on, in 1943, when the contribution rate was amended and there was a detailed revelation of the charges to its account for benefits paid and the findings made in the individual case. And there was a full judicial review by *certiorari.*

Employment security is a branch of social insurance designed to serve the general welfare. Unemployment insurance makes provision against the loss of income incident to involuntary unemployment. A special fund established for the achievement of this objective is raised and maintained by an excise in the form of payroll and wage taxes. The purpose is to relieve the public generally of the economic burden of unemployment and place it on industry. *55 Yale Law Journal, 1.* The specific aim of the provisions of the New Jersey Act for experience or merit rating is to encourage stable employment and to make a fair and equitable apportionment of the burden of the payroll excise. The whole is to promote the essential public interest rather than the particular interest of the employers. If the outstanding policy of the statute is to be served, compensation must be rendered promptly to workers whose income has ceased by reason of involuntary unemployment. The right to these benefit payments is not conditioned upon notice to the individual employer. The special interest of the employer is the measurement of the payroll excise by the benefits paid; and he cannot complain of the want of due process if he is afforded a full hearing at some stage of the proceedings on the question of the validity of the charges to his account for benefits paid. The requirements of due process are satisfied if, after appropriate notice, the person charged with the excise be given an opportunity to be heard as to the validity and the amount of the levy at some point in the proceedings before the excise becomes

irrevocably fixed. *Nickey* v. *Mississippi,* 292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934); *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1924); *McGregor* v. *Hogan,* 263 U. S. 234, 44 S. Ct. 50, 68 L. Ed. 282 (1923); *Turner* v. *Wade,* 254 U. S. 54, 41 S. Ct. 27, 65 L. Ed. 134 (1920); *Security Trust & Safety Vault Co.* v. *Lexington,* 203 U. S. 323, 27 S. Ct. 87, 51 L. Ed. 204 (1906); *Galluo* v. *Schmidt,* 183 U. S. 300, 22 S. Ct. 162, 46 L. Ed. 207 (1902); *Pittsburgh C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 19 S. Ct. 90, 43 L. Ed. 354 (1898); *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247 (1895). Notice and hearing are requisite where the determination of the amount of the levy involves the exercise of *quasi*-judicial power. *Turner* v. *Wade, supra; Hodge* v. *Muscatine County,* 196 U. S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905). Due process of law is denied only where the proceeding is arbitrary, oppressive or unjust. *Glidden* v. *Harrington,* 189 U. S. 255, 23 S. Ct. 574, 47 L. Ed. 798 (1903).

Here, plaintiff was afforded an adequate hearing in the administrative tribunal, and there was available a full appellate review both on the law and the facts. *Rules 1:20-20, 3:81-9.* The delay in the notice merely delayed the time for appeal. The definitive inquiry is whether plaintiff suffered prejudice by the failure of prompt notice of the allowance of the claims for benefits. Plaintiff's argument concedes as much. A finding of prejudice would be arbitrary. The claim of injury is theoretical and fanciful, utterly without foundation in fact. In the circumstances, disburdening plaintiff's account of these benefit payments would not be in accord with equity and right conscience. Due process is a principle of natural justice secured by Magna Charta and the successive constitutions of Nation and State; the substance of procedural due process is reasonable notice and opportunity to be heard, and the principle is not to be pressed beyond its essential quality. In the case made here, the "bare possibility" of injury is not enough; there must be a showing of the likelihood of harm. *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945); *Stockholders of the Peoples Bank-*

ing Company of Smithsburg v. *Sterling*, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937). Unless approximately one-half of all the unemployment compensation benefits paid to plaintiff's detached employees during the years 1939, 1940 and 1941 were in violation of the Act, as utterly devoid of merit, plaintiff would still be liable to the penalty rate of 3.6%.

It follows that if plaintiff's account be disburdened of the base-year charges of $3,112.61, and the unallocable items amounting to $1,750.76, the penalty rate of 3.6% stands unaltered and so there is no occasion to consider the question of the validity of those charges.

Laches and the principle of estoppel in *pais* serve to bar the relief sought. Plaintiff knew that benefits were being paid to the separated employees, and it was well aware that, in making these payments, the Commission relied upon its failure to make known grounds of disqualification in response to the notices B-11. By plaintiff's conduct, the Commission was led to believe that the claimants were under no disqualification, and acted accordingly. Plaintiff intended that its inaction be so interpreted, for that was the fact. Plaintiff cannot now in equity and good conscience demand that, for want of the notice of the initial determination, it be disburdened of the benefits so paid. Compare *McSwooney* v. *Equitable Trust Co.*, 127 N. J. L. 299 (E. & A. 1941); Appeal dismissed, 315 U. S. 785, 62 S. Ct. 805, 86 L. Ed. 1191 (1942); *Sun Dredging, &c., Company* v. *Ottens*, 85 N. J. L. 740 (E. & A. 1913). One may not be permitted to found a claim upon his own inequity. *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 54 S. Ct. 325, 79 L. Ed. 647 (1934). There was acquiescence by conduct in the administrative procedure which precludes its repudiation to serve plaintiff's present interest in a discriminatory contribution rate. The cancellation of these charges to plaintiff's account "would not be responsive to the demands of justice and good conscience." *New Jersey Suburban Water Co.* v. *Harrison*, 122 N. J. L. 189 (E. & A. 1939).

The judgment of the Appellate Division is reversed and the determination of appellant's contribution rate by the Unemployment Compensation Commission is affirmed.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM, 1950

No. A-86

HORSMAN DOLLS, INC., a Corporation of New Jersey, *Plaintiff-Respondent,*

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, *Defendant-Appellant*

CASE, J. (Dissenting):

The judgment of the Appellate Division should, I believe, be affirmed throughout.

Benefits were charged to respondent's account by the Unemployment Compensation Commission for the years 1939 to 1941 inclusive in the amount of $93,000 where respondent was the last employer and of $3800 where respondent was the employer in the base year. Those figures do not represent the judgment; they are simply important factors in determining the plaintiff's rate of contribution to the general fund. It was conceded before the Appellate Division and is conceded before us that the item of $3800 was improperly included. For accuracy in the record and for a precise disposition of the issues there should, therefore, be no disturbance of the striking of that item by the Appellate Division.

My vote to affirm the judgment in the Appellate Division in setting aside the remainder of the decision by the Commission is substantially upon the grounds stated in the opinion written by Judge Colie for the Appellate Division and reported in 9 N. J. Supra, 101.

The statute as it then was (R.S. 43:21-6(b)) required that the executive director, by his designee, should determine whether a claim for benefits was valid, and, if valid, when the payments should begin, the weekly amount payable

and the maximum duration thereof, and should promptly notify the claimant and *any other interested party* of the decision and the reasons therefor. The Commission was not authorized to pay benefits until such notice had been given and the designated period for appeal had elapsed. The last employer was, of course, an interested party; none more so, because the charge would be made against his account. The deputy originally recognized that obligation and maintained the practice of sending to the employer a notice on Form B-11 that the worker had made claim for benefits, that the records of the Commission indicated that the claimant was eligible for benefits in a named amount and that if the employer had any objections to payment of the claim he should check appropriate items in the form and return, and along with that notice, and in effect as a part thereof, the deputy sent a letter stating, *inter alia,* that "the purpose of the notice is to inform you that the Commission has declared the claimant to be eligible for benefits in the amount as indicated, and to allow you to present to the Commission any information in your possession which would make the claimant ineligible for benefits." The information thus given measurably complied with the statute; it notified the employer that the Commission had considered and granted the claim in the amount stated on Form B-11. The importance of that information lay in the fact that the claim could have been invalidated by incidents which occurred after the worker had left the employer, about which the employer would have no information but upon which it was the deputy's duty to find the facts and so determine the validity of the claim. Such incidents, for instance, could be the claimant's availability for work, pregnancy if a woman, the claimant's removal from the labor market, refusal to take a comparable job, receipt of old age pension, conditions which could depend upon facts wholly foreign to, or subsequent to, the employer's record. That the employer had no adverse information to communicate did not signify that there were no disentitling facts or that the employer was not interested in being notified of the decision. I find no concession by the employer that the benefits in question were valid and

properly allowed; the concession was that the employer's record did not disclose invalidation. The Commission could not either by rule or regulation, or by a procedure adopted by its officers and employees, nullify a statutory requirement; it could not place upon an employer the burden of doing that which the statute imposed upon the Commission. And it is not for us to hold that the employer was obliged, before receiving notice of the decision, to make such inquiry into facts outside his knowledge as would enable him to determine, in advance, what his course would be with respect to an appeal.

For some reason the office changed Form B-11 so that it no longer contained the amount of benefits for which the worker was eligible and discontinued sending the letter or any substitute form of notification that the claim had been allowed. Indeed there is no satisfying proof that the office followed the practice of making a determinaiton of validity unless the issue of a compensation check is, *ipso facto,* to be accepted as such; and even notice of the payment of the check was not given the employer. All, then, that the employer knew was that a claim had been presented; it was left in complete ignorance of the finding thereon. I do not consider notice of successive weekly payments so important as an initial notice that the claim was determined to be valid. The omission was clearly in violation of the statute, and that which was omitted was, in my opinion, a necessary preliminary to a charge against the employer's account for the purpose of fixing the employer's rate of contribution to the fund. The workers to whom unemployment benefits were paid are not concerned with this proceeding.

That the requirement is considered vital by the legislature is apparent from the continued direction in even more positive terms, as by ch. 308, P. L. 1945, in amending the paragraph designated above, "The deputy shall promptly notify the claimant, the most recent employing unit and all employers in the base year of the decision and the reasons therefor", and by ch. 167, P. L. 1950 (R. S. 43:21-6 (b) (2)), "Whenever a determination of eligibility shall be made with respect to the first week of the benefit year for which benefits are claimed, the claimant, the last employing unit

and all employers in the base year shall be promptly notified of such determination". Provisions enacted subsequent to the period in question do not, of course, vary the obligation of the Commission or of its officers, but the statutory citations indicate the importance which the legislature attributes to the making of a determination and the giving of immediate notice thereof to the employer.

Inasmuch as nothing answering to a judicial or quasi-judicial determination was made, and no notice of validity or allowance was given, I can see nothing else than that the plaintiff was deprived of its right of appeal made, by the statute, to depend upon the making of the decision and the giving of notice thereof.

Justice Acherson concurs herein.

APPENDIX "C"

HORSMAN DOLLS, INC., A CORPORATION OF NEW JERSEY, PLAINTIFF-APPELLANT, V. UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, DEFENDANT-RESPONDENT.

Superior Court of New Jersey, Appellate Division

Argued July 10, 1950—Decided August 15, 1950

On appeal from decisions of Unemployment Compensation Commission.

Before Judges McGeehan, Colie and Eastwood

Mr. Samuel Kaufman argued the cause for appellant (Messrs. Bilder, Bilder & Kaufman, attorneys).

Mr. Herman D. Ringle argued the cause for respondent (Mr. Charles A. Malloy, attorney).

The opinion of the court was delivered by

COLIE, *J. A. D.:*

This matter is before the court as an appeal under Rule 3:81-8 from final decisions of the Unemployment Compensa-

tion Commission rendered April 1, 1948. *Certiorari* was allowed by a justice of the former Supreme Court prior to September 15, 1948.

Horsman Dolls, Inc., is a subject employer under the Unemployment Compensation Act. The act as originally passed provided for contributions from subject employers at a uniform rate. Thereafter and at the times with which this litigation is concerned, the system of "experience or merit rates" was effective. The rate for a given employer was fixed by the Commission as follows: The employer contributions were totaled and the total benefits paid to employees deducted therefrom, the balance was the "reserve fund" credited to the employer's account. The total contributions made for the past three and five years were computed. These totals were divided by three and five respectively to get the average yearly contribution. The higher of the average yearly contribution was taken as the basis of determining the percentage that the "reserve fund" bore to it. That percentage was called the "reserve ratio" and dependent upon it, future contribution rate was fixed by the Commission. The rate varied from a high of 3.6% where employer contributions were less than the benefits charged to it, to a low of .9% where the reserve ratio equaled or exceeded 10%.

The decision under review fixed the contribution rate for the company at 3.6% for the years 1942 and 1943 and therefore the amount of benefits paid is important since that amount is a factor in determining "reserve ratio" and dependent upon that, the contribution rate.

Horsman Dolls, Inc., is the successor of Regal Doll Co. The change in name took place in 1939. The 1942 rate for Horsman Dolls was fixed at 2.7%. Thereafter the Commission recomputed the Horsman Dolls rate at 3.6%. The increased rate came about as a result of combining the Regal account for the period January 1, 1936-December 31, 1939, and the Horsman account for the period January 1, 1940-December 31, 1941. When Horsman Dolls was notified of the 3.6% contribution rate it filed a petition for hearing and as a result of information obtained at the hearing and in a memorandum of the Commission dated October 27, 1943,

learned that the charges against its account, as most recent employer, were $93,266.16 of which $91,094.77 arose from benefits charged against Regal.

(1) R. S. 43:21-6 (b), at the time with which we are dealing, provided that a deputy should examine a claim filed for benefits, find the facts, determine the validity of the claim and, if valid, the week when payments commence, the amount payable and the duration of the payments, and then provided that "The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor." The Commission, presumably acting in conformity to the above provision, originally set to the most recent employer a form B-11 entitled "Notice to Employer of Benefit Allowance," and an informational letter. The form advised the most recent employer of the claim, that the records indicated the claimant to be eligible for benefits in an amount specified in the form and that the addressee was the most recent employer. The letter advised the purpose of the form and the mathematical formula used to determine the charge against the employer. In May, 1939, a new B-11 was prepared, designated "Notice to Employer of Claim for Benefits." The use of the informational letter was discontinued in May, 1939. The revised form B-11 set forth that the worker stated his last employment to be with the addressee and that he had filed a claim and that the wage records in the office of the Commission indicated him to be eligible. The revised B-11 did not advise the employer that an allowance had been made or the amount of such allowance, and was sent only to the most recent employer and not to the employer or employers in the base or prior year. The revised B-11 did not constitute notice of the decision of the deputy and plainly does not comply with the statutory requirement.

(2) When the Commission in May, 1939, ceased sending the informational letter and the original B-11 which gave notice of the allowance of the benefit, the employer no longer received the notice required by the statute. The revised B-11, in the absence of an explanatory letter, gave the employer notice only that a claim had been made. The em-

ployer is never affected by the mere making of a claim. The statute requires notice to the employer that an allowance had been made. It is the making of an allowance, not the filing of a claim that affects the employer's rate.

(3) In its brief the Commission argues that Horsman Dolls cannot challenge the procedure followed by the deputy because of its failure to comply with Regulation 20.02 which we quote below:

"20.02. Separation Notices Required Under Conditions Which May Disqualify:

"(a) Whenever a worker is separated from his employment (permanently or for an indefinite period or for an expected duration of seven or more days) under conditions which may disqualify such worker from benefits pursuant to the provisions of Section 5 of the Law, his employer shall within twenty-four hours after such separation deliver to such worker or mail to his last known address, if delivery is impossible or impracticable, a separation notice on such form as may be prescribed by the Commission. Such notice shall set forth: (1) the worker's full name; (2) his social security account number; (3) the last day on which he was employed; (4) a brief statement of the reason for the separation; (5) such other information as is required by such form. The employer shall immediately send a copy of such separation notice to the office of the Commission at Trenton.

"(b) Upon request by the Commission for any information with respect to the separation of any worker separated from his service for an employer or employing unit, such employer or employing unit shall, within forty-eight hours following the receipt of such request, furnish the Commission with the information requested. Any employer who fails either to furnish the separation notice referred to in Regulation 20.02 (a) to a worker separated from his employment and to the office of the Commission at Trenton, or to indicate thereon that such worker may be disqualified for benefits under any provision of Section 5 of the Law, or to

furnish any other information requested by this Commission, shall be presumed to have admitted that such worker is not disqualified under any of the provisions of Section 5 of the Law."

The statute requires the deputy promptly to notify an interested party of the decision and we hold that the failure of Horsman Dolls, Inc., to give the notice of separation called for by the regulation does not excuse the failure of the Commission to perform its statutory duty. The Commission argues that the "decision" required by the statute was made when the first check in payment of benefits was sent to the employee, i.e., that the check was "tantamount to a decision." Even accepting this argument, which we do not do, it still would not be notice to the employer because the employer never received notice that the check had gone out. The effect of the regulation is to put the burden of proof on the employer when the employer questions a decision or allowance, that is to say, it creates a presumption which the employer is called upon to rebut if he can. If the original B-11 and the informational letter had gone out or if the statute had been complied with, then the employer, if he wished to dispute the amount of the award, would be faced with the burden of proving the facts upon which he would depend to attack the amount or the granting of the award. That is the extent of the effectiveness of the regulation and it cannot be tortured into doing away with the statutory requirement of the notice of allowance.

The decisions under appeal are reversed.

APPENDIX "D"

Decision of the Unemployment Compensation Commission

The Unemployment Compensation Commission of New Jersey met in formal session on the 9th and 27th of January, 1948, and having reviewed and considered the record of the proceedings compiled at formal hearings held on May 14,

May 17, July 28, September 28 and November 1, 1943, determined as follows:

FINDINGS OF FACT:

On January 8, 1943, Horsman Dolls, Inc. (successor to Regal Doll Co.) was notified by the Commission that its contribution rate for the year 1942 was 3.6 per cent. A formal petition for hearing was filed by the Petitioner with the Commission on March 9, 1943, wherein it alleged "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Petitioner at the formal hearings contended that it had during the years 1939 to 1941, inclusive, received no notices which conformed to the requirements of subsection 6(b) of the Unemployment Compensation Law (R. S. 43:21-6(b)) with exception of the notices received prior to the months of June or July, 1939; that the failure on the part of the Commission to forward proper notices to it precluded the Commission from charging the benefits paid to its former employees to its account, and that such charges could not be considered by the Commission in determining its contribution rate for the year 1942 under the contribution rate formula based on benefit experience prescribed in subsection (7) (c) of the Unemployment Compensation Law (R. S. 43:21-7(c)); that it should be assigned the lowest contribution rate of .9 per cent.; and that the Commission's action in charging the benefits paid to its former employees to its account violated its constitutional rights under the Fourteenth Amendment to the United States Constitution because such charges were considered in determining its contribution rate for the year 1942.

By stipulation it was agreed that the action taken by the Commission with respect to the 1942 contribution rate, after a consideration of the record of the proceedings in this case, would apply to the rates assigned to the Petitioner for the years 1943, 1944 and 1945.

The testimony shows that during the years 1939 to 1941, inclusive, claims for benefits were filed with the Commission by individuals who had formerly been in the employ of the Petitioner, and that when each claim was filed with the Commission, the Commission mailed to the Petitioner a

notice thereof; the notices are represented by Exhibits P-4, P-10 and P-11 of the record.

The Petitioner did not forward to the Commission any Separation Notices as required by the Commission's regulations, and when it received notices that benefit claims had been filed by its former employees, it did not give the Commission any notice or information that the individuals involved were not entitled to receive benefits or were disqualified from receiving benefits, nor did it make any objection to the payment of benefits.

The Petitioner's business was seasonal and benefit claims were filed by the Petitioner's employees at the time of seasonal lay-offs.

In many instances, appeals from the action of the Commission's deputy denying benefits were taken by claimants to the Appeal Tribunal, and although the Petitioner received full notice of such appeals and the hearings scheduled before the Appeal Tribunal, it did not appear at any hearing nor express any interest in the proceedings.

Benefits were charged to the Petitioner's account for the years 1939 to 1941, inclusive, as follows: $93,000 where it was the last employer in the base year, $3,800 where it was not the last employer in the base year, and $700 unallocated, making a total of $97,500. The Petitioner's contribution rate would still be 3.6 per cent for the year 1942 even if the unallocated items and the charges made to the Petitioner's account, where it had not been the last employer, were excluded.

During the proceedings, notices designated Forms B-110, showing the amount of benefits paid to each claimant and the period charged with such payments, were presented to the Petitioner and are marked in the record as Exhibit P-15. On November 1, 1943, the Petitioner was presented with notices showing in detail the action taken by the deputy with respect to each benefit claim; particularly, the amount of benefits payable, the amount of benefits paid, the period covered with respect to which benefits were paid, etc.

No proof was offered by the Petitioner to show that its former employees, during the period involved, were not entitled to receive the benefits which were paid to them.

OPINION AND DECISION:

The Commission is put in this position: It is asked by the Petitioner to erase from its account charges that have been made by reason of the payment of benefits to its former employees. There is no proof whatsoever before the Commission that any of these charges were improperly made or that any of the employees were not entitled to those benefits; Petitioner has had ample opportunity on several occasions to take timely objection to these payments and to test their legality before the benefit tribunals erected under the Unemployment Compensation Law; Petitioner has persistently and stubbornly refused to so test the validity of these payments before the benefit tribunals, insisting that it has been under no obligation to do so and that this Commission, nevertheless and notwithstanding, must disburden its account of the chargebacks so made. This Commission conceives that it is without legal authority to do this and it is unable to relieve the account of any employer of charges for benefits paid unless there is a demonstration in the proper tribunals that the individuals to whom such payments were made were not entitled thereto.

ERNEST EGER,
Chairman of the Commission.

Commissioners concurring:
MARY G. ROEBLING,
A. CREW SCHIELKE,
NORMAN F. WISS.

Attest:

DEAN H. ASHTON,
Hearing Clerk.

Dated: April 1, 1948.

OCT 23

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 398

HORSMAN DOLLS, INC.,

Appellant,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey;
HERMAN D. RINGLE,
Attorney and Counsel for Appellee;
CHARLES A. MALLOY,
Chief Counsel for Appellee, Counsel for Appellee.

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Unemployment Compensation Law, adopted in 1936, (N.J.R.S., 43:21 (3a), (6), (6a), (6b), (6c), (7a), (7b), (7c) 2, 8
United States Code, Title 28, Section 1257(2) 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 398

HORSMAN DOLLS, INC.,

Appellant,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee asserts that the statutory provision, Title 28, U. S. Code, Section 1257(2), relied on by the appellant does not sustain the jurisdiction of the Court; the unsubstantial character of the grounds stated by the appellant and the lack of substance in the questions raised by this appeal are so apparent on the face of the record as to warrant the Court to summarily dispose of the appeal at this time.

Nature of the Case

The Unemployment Compensation Law, adopted in 1936, imposed a tax upon all subject employers, which was

uniform in rate until 1942 (N.J.R.S. 43:21-7(a) and (b)), and directed the payment of benefits during and after 1939 (N.J.R.S. 43:21-3(a)).

In the year 1942 and thereafter, an employer under subsections 7(c)(3) and (4) (Appendix herein), after three years of coverage retained his basic rate of 2.7 per cent or was assigned a merit rate of 1.8 per cent or 0.9 per cent, or assigned a penalty rate of 3.6 per cent, depending on his past employment experience.

The contribution rate assigned to the appellant, Horsman Dolls, Inc., for the year 1942 was 3.6 per cent. The appellant protested this rate before the Commission, contending that all charges made to its account during 1939 to 1941, inclusive, should be removed and that its contribution rate for 1942 should then be redetermined.

The Commission scheduled a hearing to determine the nature and the merits of the appellant's complaint. It was not until the hearing was considerably in progress that it was revealed that the appellant wished all charges made to its account during the years 1939 to 1941, inclusive, erased without challenging the propriety of any benefits paid in the tribunals constituted to hear and decide disputed claims for benefits under section 6 of the statute (Appendix herein), because it had not received notices of the decisions made by the deputy under subsection 6(b) (R163a-37-40; R232a-5-15; R233a-14-20). Hearings before the Commission on the appellant's protest were concluded on November 1, 1943.

After protracted litigation on another phase of this case, the Commission made its decision which held, in substance, that the Commission did not have the power or right under the statute and under the facts of this case to erase the benefit charges made to the account of appellant, Horsman Dolls, Inc., that the appellant had to exhaust its administra-

tive remedies before the appellate tribunals constituted under N.J.R.S. 43:21-6, and that the contribution rate assigned to it for 1942 of 3.6 per cent was properly cast.

The opinion of the Supreme Court of New Jersey (officially reported in 7 N. J. adv. 541), which affirmed the decision of the Commission, has been brought before this Court for review on appeal.

Facts

When an employee of the appellant was detached from his employment, during 1939 to 1941, inclusive, he reported to the local office of the Employment Service and filed an initial claim for benefits (R73a-30-38; Ex. P-2, R261a). The initial claim for benefits was transmitted to the central office of the Commission in Trenton where the claim was carefully checked against all reports and other information in the possession of the Commission (R74a-30-40; R75a-4-18). Then a "Notice to Employer of Claim for Benefits" (B-11) (Ex. P-9, R272a; Ex. P-14, R281a) was prepared in each instance when the claim was a valid one (claimant had earned $150 or more in his base year) and mailed to the appellant when it was the last employer (R57a-5-13; R210a-11-38; R216a-29-40; R218a-24-31; R220a-4-22).

The appellant did not send separation notices (B-6) to the Commission, required under the latter's regulations (Ex. P-16, R284a; R135a-12-22; Ex. C-1) although the appellant had possession of the regulations (R221a-4-7, 15-18).

Besides the appellant's failure to send separation notices, it never responded to any "Notice to Employer of Claim for Benefits" (B-11) which was mailed to it by the deputy with respect to each benefit claim (R238a-12-23). The appellant received the aforementioned Notices (B-11's) but paid no attention to them (R126a-24-33). The only witness,

Robert I. Garnier, produced in behalf of the appellant specifically testified as follows (Hearing of May 17, 1943):

> "Q. Mr. Garnier, are you qualified to testify in behalf of the company with respect to all matters that pertain to the employment experience or to its employment experience, and particularly in so far as it may affect any charges that were made to the employer's account in the Unemployment Compensation Commission during the years 1939 to 1941 inclusive? A. Yes.
>
> "Q. At the last hearing you testified that all communications and notices, particularly from the taxing agencies of the State, are directed to your attention? A. Yes, sir.
>
> "Q. And you also testified that by reason of the practice followed with your company that you received the regulations of the Commission? A. Yes." (R220a-29-40, R221a-5-8).

and the witness had previously testified as follows:

> "Q. Who took charge of them? A. Of the B-11's?
> "Q. Yes. A. Why I will answer this this way: In 1938, 1939 and 1940 I really paid no attention to them." (R132a-5-8).

and the witness further testified:

> "Q. Have you got all the B-11's that you received from the Commission after 1939, 1940 and 1941? A. No, I have not.
>
> "Q. What did you do with them? A. Why, sometimes when we cleaned up our files, I probably threw a lot of them out, I didn't keep them." (R136a-12-17).

This witness, Robert I. Garnier, further testified that the appellant never responded to the B-11's or otherwise notified the deputy or the Commission, because the appellant's business was seasonal in nature and was shut down at certain periods of the year; and testified that the appel-

lant had no objection to the payment of benefits because there was no employment. The witness's testimony in this regard, after directing attention to the fact that the appellant paid no attention to the B-11's, was as follows (Hearing of May 17, 1943):

> "Q. Previous to that you testified you paid no attention to them? A. Right.
>
> "Q. Why not? A. Because our business is a seasonable business and we were shut down January, February and March, and sometimes April. In the last two years we have worked right through.
>
> "Q. During those years when your business was being carried on, you received some of these notices, didn't you? A. Yes.
>
> "Q. You didn't answer them? A. No, because we had no employment. There was no objection I could make." (R141a-40; R142a-5-14).

The appellant's witness (Mr. Garnier) testified that he, as the representative of the appellant, would have known during the years 1939 to 1941, inclusive, whether any of the appellant's detached employees were not entitled to benefits (R. 224a-24-32). He also testified that he knew that some of its detached employees were receiving benefits; e.g.,

> "Q. I am allowing you to speak your mind. You may continue. Do you mean to say, Mr. Garnier, that being in the employ of your—A company whose business was highly seasonal during the years 1939 to 1941 inclusive, having knowledge that there was an Unemployment Compensation Law, being familiar with our law and with our regulations, knowing that these unemployed individuals, such as your employees, would go to a local office for benefits, do you say that you believe that no one of your employees were receiving benefits during those years? A. I wouldn't say that. Just repeat that?
>
> "Q. Do you have any reason to say that you believe that none of the disemployed employees of the company

during the years 1939 to 1941 were not receiving benefits? A. I know some were receiving benefits.

"Q. Had you any reason to believe that all of them were not receiving benefits when they were laid off? A. That I couldn't tell you. I couldn't swear to that. The only way I could answer that question is that I knew certain individuals were receiving compensation because they told me. I had my own son was receiving compensation in those years, so that I know definitely that he was paid. That is the only way I can answer that question." (R. 236a-13-40).

When an employer (this did not apply to appellant in the instant case because it paid no attention to the B-11's) responded to the B-11 or transmitted a separation notice (B-6), a notice of the disposition of the case by the deputy was always mailed by him to the employer (R. 100a-25-32; R. 112a-38-41; R. 113a-5-28; R. 147a-22-40; R. 148a-4-14; Ex. P-13, R. 279a-280a).

The deputy testified that whenever any employer responded to a B-11, the claimant did not receive any checks before the employer was notified of the deputy's action or decision favorable to the claimant and of the employer's right of appeal (R. 84a-8-21).

In June, 1942, appellant received a notice of its experience rate for that year which showed thereon the reasons for the change of its contribution rate (Ex. P-1, R. 9a; R. 149a-25-27). This shows that from 1936 to 1941, inclusive, it had paid contributions to the Commission in the sum of $48,929.26 and that benefits paid to its detached employees and charged to its account were in the sum of $98,203.34.

At the time of the hearing of September 28, 1943, it was shown that of the aforementioned benefits charged to the appellant's account, only $3,112.61 was paid to claimants when appellant was not the last or most recent employer,

and that the sum of $1,750.76 could not be allocated; however, if the appellant's account was disburdened of the total ($4,863.37), its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R. 179a-10-40; R. 180a-4-10). Later adjustments of the unallocated sum did not affect the result (R. 244a-4-27).

Shortly after the transmission of the Notice of Employer Contribution Rate for the year 1942 (Ex. P-1, R. 9a) to appellant and its request for a hearing thereon, the appellant received a separate breakdown of the benefit charges, etc., for the years 1939 to 1942, inclusive, on a separate form (B-110) (Ex. P-15, R. 283a, R. 143a-37) for each one of its employees who had received benefits during those years.

On November 1, 1943, the appellant through its attorney received a separate statement with respect to each benefit claim filed by its detached employees during 1939 to 1941, inclusive, which contained all the factors or elements of an "initial determination" and the benefits paid on each claim during those years. (Ex. P-19, R. 281a; R. 246a-30-40; R. 247a-4-24; R. 249a-4-11). From the date of the receipt of the B-110's and the receipt of the detailed statements in 1943, no proof was submitted by the appellant to show that any detached employee, except a few isolated duplications corrected by the Commission itself, was not entitled to receive his benefits.

On January 13, 1943, appellant through its attorney, wrote to the Commission, advising that it had received the Commission's amended Form AC-174, showing the computation of its contribution rate for 1942 (R. 9a) and requested a hearing on the ground that it disagreed with the contribution rate shown on such form. In answer to this communication, the Commission mailed to the attorney for appellant, a form of Petition for Hearing which was executed by it on March 9, 1943, and returned to the Commission (R. 10a-11a).

Appellant set out the following reasons for its request for a hearing:

> "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Commission, after years of litigation on another phase of this case, made its decision on April 1, 1948 (R. 19a-22a). It decided that it was without legal authority to grant a continuation rate for the year 1947 for the appellant other than 3½ per cent, and that it was without legal authority to relieve the account of the appellant of the charges for benefits paid unless and until their improperity was determined in the proper tribunals established by law.

I. Reasons and Grounds Relied Upon for Jurisdiction

The principal ground relied upon to sustain the jurisdiction of this Court is the appellant's failure to challenge the constitutionality of the statute before the Supreme Court of New Jersey. The record shows that the validity of the statute (N. J. Revised Statutes 43:21-7(d)). Appellant herein was not drawn in question as repugnant to the United States Constitution; and for this reason alone the appeal must be dismissed.

Powell v. Supervisors of Monmouth County, 150 U. S. 481;

Jett Brothers Distilling Co. v. Carmichael, 292 U. S. 1;

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

In fact, the appellant itself directed attention to the constitutionality of the statute in its argument to the Court below. In the last brief filed by the appellant with the Supreme Court of New Jersey, entitled "Supplemental Brief for Plaintiff-Respondent on Reargument" (certified

copy of which has been filed herein), the appellant said (pp. 6, 7):

> "*In this case, however, Mercurio Dolfi does not complain about the Unemployment Compensation statute.* The procedure which the legislature established, if it be read and interpreted as the Board of Review construed it (See Br. [illegible] main brief), is valid and constitutional. By that interpretation the deputy is required to give the notice which satisfied due process. In that event the plaintiff does not challenge the constitutionality of the statute. *What is against due process in this case is the deputy's violation of the statute;* * * *" (Italics ours.)

and the appellant further directing attention to the constitutionality of the statute said (p. 8):

> "*In the face of a statute which specifically provided for a constitutional method of giving to the employer the requisite notice,* the deputy was not justified in substituting something less than the full notice to which the employer was entitled.
>
> "The fact that the plaintiff received a 'notice that a claim was filed' does not bar him by estoppel from maintaining or demand that he be afforded the particular notice which the legislature directed he receive." (Italics ours.)

and again the appellant stated its position (p. [illegible]):

> "The deputy was required to adhere to the specific standards which the legislature imposed upon him and a lesser notice which the Commission invented was no substitute for the legislative mandate."

Furthermore, the Supreme Court of New Jersey, in both the majority and dissenting opinions, gave the statute a construction which conformed to the one urged by the appellant. The appellant had argued that it was entitled under the statute to notice of the date of the deputy and

withstanding the fact that it had not responded to the "notices of claims for benefits" received by it from the deputy and had not urged any objections to the payment of benefits. The Court, in construing the statute, decided, "we shall resolve the doubt in favor of notice" (Opinion, p. 5; 7 N. J. 541, 547). The Court held that the appellant could not complain, because it could show no harm or injury and further, that laches and the principle of estoppel in *pais* served to bar the relief sought. The opinion was based on these facts: that no objections were made by the appellant to the payment of benefits, during 1939 to 1941, inclusive, because it knew of no objections and had no knowledge of any disqualifying factors; that from the time it received notice of its contribution rate in 1942 including summary statement of benefits paid or from the time it received detailed statements in 1943 with respect to each benefit claim and the action taken thereon, it did not initiate any administrative appeals to review the benefit allowances and did not attempt to challenge the validity of the charges to its account in any administrative tribunal (See subsections 6(c), (d) and (e) of the New Jersey statute, Appendix herein).

The findings of the State court upon matters of fact are conclusive.

Noble v. *Mitchell,* 164 U. S. 367;
Chrisman v. *Miller,* 197 U. S. 313;
Waters-Pierce Oil Co. v. *Texas,* 212 U. S. 86;
Miedreich v. *Lauenstein,* 232 U. S. 236;
Willoughby v. *Chicago,* 235 U. S. 45;
Merchants Mutual Auto. Liability Ins. Co. v. *Smart,* 267 U. S. 126;

and this Honorable Court "from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U. S. 117, 125.

Sylvester v. *Washington*, 215 U. S. 80;
Lem Woon v. *Oregon*, 229 U. S. 586;
John v. *Paullin*, 231 U. S. 583;
Erie R. R. v. *Tomkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202.

From the foregoing, it is to be observed that the statutory provision (28 U. S. C. 1257(2)) relied on by appellant does not sustain the jurisdiction of this Court.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The presence of a substantial Federal question is essential to invoke the jurisdiciton of this Court. If the questions presented are plainly unsubstantial, jurisdiction is not taken.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality is unsubstantial where (a) it is "obviously without merit," or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32;
Levering & Garrigues Co. v. *Morrin, supra.*

The construction of the statute by the Supreme Court of New Jersey was not in conflict with the appellant's contention. The Court held on the facts, that the appellant was not injured or damaged (7 N. J. 541, 549, 551); that any delay in notice merely delayed the time within which the appellant could take an appeal from deputy action (ibid.,

551); that "it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account" (ibid., 550) (see subsections 6(c), (d) and (e), Appendix herein, establishing administrative tribunals to hear appeals from deputy action); and that by reason of laches and estoppel the appellant was barred from the relief it sought (*ibid.*, 552).

This Honorable Court accepts the findings of the State Court upon matters of fact as conclusive.

Noble v. *Mitchell, supra;* and cases cited in "Grounds making against Jurisdiction".

And the construction of the statute adopted by the highest appellate court of the State of New Jersey and its interpretation of the scope of the law, must be accepted as conclusive.

Osborne v. *Florida,* 164 U. S. 650, 654;
Missouri ex rel. Hurwitz v. *North,* 271 U. S. 40;
Sioux Remedy Co. v. *Cope,* 235 U. S. 197;
Farncomb v. *Denver,* 252 U. S. 7;
McGregor v. *Hogan,* 263 U. S. 234;
Neblett v. *Carpenter,* 305 U. S. 297;
Alton R. Co. v. *Illinois Commerce Commission,* 305 U. S. 548;
Williams v. *Kaiser,* 323 U. S. 471, 473.

In *Utley* v. *St. Petersburg,* 292 U. S. 106, the Court held that estoppel and laches are non-Federal grounds. The Court said (p. 111):

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they

held aloof without word or act of protest, and then invoked the aid of equity. Following Abell v. Boynton, 95 Fla. 984, 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rests upon a non-federal ground broad enough to support it."

To support this appeal, the appellant relies strongly on *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126; *Morgan* v. *U. S.,* 298 U. S. 468, and *Morgan* v. *U. S.,* 304 U. S. 1. As a matter of fact, these cases support the position of the appellee rather than that of the appellant. Administrative remedies were available to appellant under Section 6 of the statute (Appendix herein) but it refrained and refused to avail itself of such remedies. *Lichter* v. *U. S.,* 334 U. S. 742; *Rochester Telephone Corp.* v. *U. S.,* 307 U. S. 125; *Slocum* v. *Delaware L. & W. R. Co.,* 339 U. S. 239.

It is respectfully submitted, therefore, that the Constitutional questions urged by the appellant have been so plainly foreclosed by the decisions referred to, hereinbefore, as to leave no room for real controversy, and the appeal, if the judgment of the court below is not affirmed, should be dismissed for want of a substantial Federal question.

Zucht v. *King,* 260 U. S. 174, 176;
McArthur v. *U. S.,* 315 U. S. 787.

Motion to Affirm Judgment of the Supreme Court of New Jersey

Therefore, comes now the appellee herein, by its attorney, and moves the Court to affirm the judgment from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that every question on which the

decision of the cause depends has been so explicitly foreclosed by the previous decisions of this Court as to render further argument thereof unnecessary.

In the alternative:

Motion to Dismiss the Appeal

Therefore, comes now the appellee herein, by its attorney, and moves the Court to dismiss the appeal for want of a substantial Federal question.

THEODORE D. PARSONS,
Attorney General of New Jersey;
JOSEPH A. MURPHY,
Assistant Deputy Attorney General;
HERMAN D. RINGLE,
Attorney and Counsel for Appellee;
CHARLES A. MALLOY,
Chief Counsel for Appellee.

Dated: October 4, 1951.

APPENDIX

CLAIMS FOR BENEFITS

N. J. Revised Statutes

43:21-6. (a) Filing.—Claims for benefits shall be made in accordance with such regulations as the commission may approve. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial determination.—A representative designated by the executive director, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final

and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal tribunals.—To hear and decide disputed claims, the executive director with the approval of the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than twenty dollars ($20.00) per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The executive director may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Board of review.—The board of review may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The board of review shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous and by the deputy whose decision has been overruled or modified by an appeal tribunal. The board of review may remove to itself or transfer to another appeal tribunal the proceedings of any claim pending before an appeal tribunal. Any proceeding so removed to the board of review shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The board of review shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness fees.—* * *

(h) Appeal to courts.—* * *

(i) Court review.—Within ten days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review thereof by writ of certiorari directed to the board of review, in which action any other party to the proceeding before the board of review shall be made a defendant.

CONTRIBUTIONS

43:21-7(a) * * *

(b) * * *

(c) Future rates based on benefit experience: (1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf. But nothing in this chapter shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged against the account of his most recent employers against whose accounts the maximum charges hereunder have not previously been made in the inverse chronological order in which the employment of such individual occurred, but the maximum amount so charged shall not exceed one-sixth of the wages payable to such individual by each such employer for employment on and after the first day of the nine completed calendar quarters immediately preceding such individual's benefit year, or two hundred forty dollars ($240.00), whichever is the lesser, but this provision shall not be construed to limit the duration of benefits payable pursuant to subsection (d) of section 43:21-3 of this title. The commission shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment during the same week.

(2) The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

(3) Each employer's rate shall be two and seven-tenths per centum (2 7/10%), except as otherwise provided in the

following provisions. No employer's rate shall be less than two and seven-tenths per centum (2 7/10%) unless and until there shall have been three calendar years throughout which any individual in his employ could have received benefits if eligible.

(4) Each employer's rate for the twelve months commencing January first of any calendar year shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his account for all such years, his contribution rate shall be:

(A) One and eight-tenths per centum (1 8/10%), if such excess equals or exceeds seven and one-half per centum (7½%), but is less than ten per centum (10%) of his average annual payroll (as defined in paragraph (2) subsection (a) of section 43:21-19 of this title);

(B) Nine-tenths of one per centum (9/10 of 1%), if such excess equals or exceeds ten per centum (10%) of his average annual payroll.

If the total of his contributions, paid on his own behalf for all past periods or for the past one hundred and twenty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum (3 6/10%).

(5) No employer's rate for the period of twelve months commencing January first of any calendar year shall be less than two and seven-tenths per centum (2 7/10%), unless the total assets of the fund, excluding contributions not yet paid at the beginning of such calendar year, exceed the total benefits paid from the fund within the last preceding calendar year; and no employer's rate shall be less than one and eight-tenths per centum (1 8/10%) unless such assets at such time were at least twice the total benefits paid from the fund within such last preceding year.

BENEFIT ELIGIBILITY CONDITIONS

43:21-4. An individual, totally or partially unemployed, shall be eligible to receive benefits with respect to any week only if it appears that:

(a) * * *
(b) * * *
(c) * * *
(d) * * *

(e) He has within his base year earned wages of not less than one hundred fifty dollars ($150.00). (As amended by chapter 114, P. L. 1941. Effective May 19, 1941.)

DEFINITIONS

43:21-19. As used in this chapter, unless the context clearly requires otherwise:

(a) * * *
(b) * * *
(c) * * *
(d) * * * Any claim for benefits made in accordance with section six (a) of this act shall be deemed to be a "valid claim" for the purpose of this subsection if the individual has fulfilled the condition imposed by section four (e).

FILED
OCT 24 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Plaintiff-Appellant,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.
ON MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION.

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Supreme Court of the United States

HORSMAN DOLLS, INC., Plaintiff-Appellant, *vs.* UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, Defendant-Appellee.	On Motion of Appellee to Dismiss Appeal or Affirm.

BRIEF OF APPELLANT.

This brief is filed pursuant to Rule 7, in opposition to a motion to dismiss the appeal from the Supreme Court of New Jersey. The appeal to this court was allowed by Associate Justice Burton by order dated September 19, 1951.

The appellant has also filed a petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered on June 15, 1951. The petition for certiorari presents questions arising under the Constitution of the United States which are in addition to those raised on the appeal.

In its brief in support of the petition for certiorari the appellant has set forth a statement of the case which contains a review of the facts involved. As a convenience to the court, we repeat that statement of facts here.

Statement of Facts.

The appellant is a subject employer under the New Jersey Unemployment Compensation Law which became effective in 1939. The statute established an unemployment compensation fund to which all employers contribute. Until 1942 the rate of contribution was uniform for all; thereafter it was controlled by the cumulative employment experience of each employer. The vital factors in determining the rate were the benefits paid to claimants and the contributions by the employer. For the years prior to 1942, according to the Commission's records, benefits paid to former employees of the appellant substantially exceeded its contributions to the fund. In January 1943, appellant was notified by the Commission that it was assigned the highest rate possible, 3.6% of its annual payroll. The same rates were fixed for the years 1943, 1944 and 1945. By stipulation these rates are also governed by this litigation. The cumulative effect of the charges from 1939 to 1942 is thus of crucial importance.

The statute provides that when a claim for benefits is filed, the deputy shall investigate and on the basis of facts found by him, render a decision upon the validity of the claim. The statute then provides that the deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The Supreme Court of New Jersey has construed the statute so that the appellant is included within the classification of "interested party".

The employer has 7 days after receipt of the notice of the decision to appeal to a tribunal within the agency.

There, for the first time, he receives a hearing at which the claimant must establish his right to benefits. If the appeal is taken payment of the benefits is stayed. If there is no appeal, benefits are to commence after the expiration of the 7 days and the employer is charged for such payments. Usually the entire charge is against the most recent employer of the claimant, but if the duration of his employment with the most recent employer is short, then a portion of the charge is assessed against prior employers. These prior employers are referred to as "base year" employers.

The statute established a series of eligibility and qualification conditions which the claimant was required to meet in order to be entitled to benefits. It was concerning these conditions that the deputy was required to investigate and find the facts. In summary, the eligibility conditions consisted in the requirements that the claimant be able to and be available for work; that he continue to report to an employment office and thus remain in the labor market; that he has been unemployed for two weeks and that he has earned a certain amount of wages during his base year. N. J. R. S. 43:21-4. The causes which will disqualify the claimant from benefits are voluntary cessation from employment without due cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute, and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States. N. J. R. S. 43:21-5. This was the statutory scheme for the years involved in this litigation.

For the first few months in 1939 the Commission sent to all employers, including appellant, a form B-11 and an accompanying letter advising that a decision had been made (R271a, R277a). In May 1939 the procedure and the form were changed by the Commission so that thereafter it sent the employers only a notice that a claim for benefits was filed. This notice was sent only to the most recent employer even though charges were assessed as well against employers in the base year. The new form asked the employer to submit any information which he had which would disqualify the claimant (R276a). The appellant received these forms when it was the most recent employer. It had no knowledge of disqualifying causes and did not respond to the Commission. After the new form was adopted, the appellant was never notified that a decision had been made upon any benefit claim for which it was charged. This was conceded by the court below.

During the hearings before the referee in 1943 upon the petition to redetermine the contribution rate, the Commission did not produce any form of decision on the benefit claim (R251a). The deputy testified that the decision was the Commission's benefit check which was given to the claimant (R48a). Since the appellant received no notice of a decision, the check was delivered and payments were made to the claimant without affording to the appellant the right to appeal and to receive an opportunity to be heard.

In November 1943, at the last hearing before the referee, the Commission offered into evidence a series of statements containing information with respect to each benefit claim for which the petitioner was charged (R249a). These

statements were compiled by the Commission from various sources of information within the agency for use as an exhibit in the cause (R3a).

It was established at the hearings that the deputy of the Commission never conducted a hearing at which the appellant was afforded an opportunity to be heard, that if there was any examination of the claims, finding of facts or making of decisions, it was done not by the deputy but by subordinates in the department (R42a to R43a; R59a; R263a).

With respect to the facts appearing in the appellee's statement opposing jurisdiction, the Commission continues its concession that it mailed to the appellant a notice of the filing of a claim for benefits only when the appellant was the last employer of the person making the claim. This was also admitted in the New Jersey courts. It thus concedes, as the minority opinion in the Supreme Court of New Jersey pointed out, that each charge made against the appellant when the appellant was not the last employer of the claimant was illegally imposed. The imposition of these charges was clearly a denial of due process under the Fourteenth Amendment to the Constitution of the United States. No contention has ever been made by the Commission and it is not made now, that notice of any kind was sent to the appellant when a claim for benefits was filed in respect of which the appellant was to be charged as an employer in the base year of the claimant.

In its statement opposing jurisdiction (page 4) the Commission quotes at length from portions of the record in which the comptroller of Horsman Dolls, Inc. testified that it did not respond to the notices (Form B-11) which it received from the Commission advising that a claim for bene-

fits had been filed. It appears from this testimony that during 1941 the business of the appellant was seasonal, although during the subsequent years the company "worked right through". The appellant was justified in making no response to the inquiry contained in the form B-11. The procedure of sending a notice of the filing of the claim was one which the statute did not contemplate and one with which the employer was not required to be concerned. The Supreme Court of New Jersey admits in the majority opinion that this procedure was "extra" the statute. 5 N. J. 550. No indication was given to the employer that the form B-11 was a substitute for the notice of decision which the statute provided and from which the employer's appeal could be taken.

In addition, the notice which the Commission sent by its very terms invoked an answer only when the employer was in a position to supply information which might lead to disqualifying the claimant from benefits. Since the appellant's records disclosed no such reason for disqualification there was no duty upon the appellant to respond to the notice. As already noted herein, as well as in the court below, most of the possible disqualifying reasons were those beyond the scope of the employer's knowledge. The contention by the Commission in its review of the facts that the appellant had no objection to the payment of benefits has no support anywhere in the record. As the dissenting opinion points out, the only concession which the appellant made was that its records did not disclose any disqualification. 5 N. J. 554. Indeed, the testimony which the Commission has quoted supports this view because the comptroller testified "there was no objection I could make".

The appellant never received an opportunity to be heard on the validity of the benefit payments before they were made. The record is clear that it did not know of the specific payments until November 1943 when the Commission put into evidence a breakdown of the various charges against appellant's account. The benefit payments upon which these charges were based had been made through the years 1939 to 1942.

POINT I.

Appellant Has a Right to Appeal Under 28 U. S. C., Section 1257(2).

It is argued by the appellee that the appellant is foreclosed from taking this appeal because it failed to challenge the constitutionality of the statute in the state courts.

The attack by the appellant upon the constitutionality of the statute (R. S. 43:21-6(b)) was constantly made from the beginning of the case. One phase of this challenge is stated in the majority opinion of the Supreme Court of New Jersey. It said:

> "It is argued on the brief that the statute requires that the initial determination be followed by weekly determinations during the compensation period of the claimant's right to continued benefits and his eligibility for work; and on the oral argument it was vigorously contended that unless the statute be construed to require weekly decisions and notice thereof to the employer, it would constitute in this regard a denial of due process."

Horsman Dolls, Inc. v. *Unemployment, etc. of N. J.* 7 N. J. 541 at 547 (1951).

Further on in the opinion the court said:

> "And the notice of the initial determination would be of no avail in the discovery of after-occurring disqualifications. Recognition of this led to the contention on the oral argument that unless the statute be construed to require weekly determinations and notice to the employer, it would be violative of due process. The statute makes no such requirement; and its failure so to provide does not constitute a denial of the essence of procedural due process."
>
> 7 N. J. 549.

The appellee points to certain statements in the briefs filed in the Supreme Court of New Jersey and contends that these statements show that the constitutionality of the statue was not questioned by the appellant. In the courts below, as well as before the Commission, Horsman Dolls, Inc. pointed to the fact that the statute did not provide for any hearing to the employer prior to the decision of the deputy of the Commission upon the validity of the claim for benefits. Since it was this decision which initiated the charge against the employer's account, the appellant argued throughout that under ordinary rules of due process it was entitled to notice and hearing before the decision of the deputy was made. *Morgan* v. *U. S.*, 304 U. S. 1 (1938). This was particularly true since the deputy's function was quasi-judicial. The hearing was an essential element of due process. *St. Joseph Stockyards* v. *U. S.*, 298 U. S. 38 (1936).

The appellant pointed out, however, that notwithstanding this otherwise fatal defect, the statute could be sustained if the court would construe it so as to insure to the

appellant an opportunity to be heard at some stage in the proceeding before the benefit payments were made and the charge became effective. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1946). This could be accomplished by construing the statute to require the deputy to send to every employer charged a notice of the decision before the payment of benefits and before the charge against his account.

In order to secure this construction of the statute the appellant had to overcome two obstacles. The first was to establish that it was an "interested party" under the statute and thus entitled to notice of the deputy's decision. The second was to establish the principle that once entitled to the notice of decision, the appellant could not be deprived of it, for if the employer never received the notice it could never know of the decision and it could never take an appeal before the payment of benefits, as provided by statute. It would, therefore, never have the timely opportunity to be heard which due process requires. Under the statute it was the notice of the decision which initiated the right to appeal and it was only upon an appeal that the statute specifically provided such a hearing.

This construction of the statute was urged by the appellant upon the New Jersey courts. The appellant contended that in order to sustain the statute against constitutional objections the court must so construe it as to make it mandatory upon the deputy to give the appellant a notice of decision in every case where the appellant was being charged. Once this condition had been satisfied and the employer had been notified of the decision before the benefits were paid, the employer would then have been afforded an opportunity to be heard and could decide for himself

whether to contest the claim or default. *Mullane* v. *Central Hanover B & T Co.*, 339 U. S. 306 (1950).

With respect to the first point, the entire court held that the appellant was an "interested party" within the statutory language and thus entitled to be notified of the deputy's decision upon the claim for benefits. This is what is meant by the statement in the opinion of the majority that the ambiguity which the court found in the phrase "other interested party" was resolved "in favor of notice". 7 N. J. 547. When the Commission argues to this court in its statement opposing jurisdiction that the Supreme Court of New Jersey did not construe the statute in conflict with the appellant's contention, it is to this point which the argument of the Commission is directed. On this issue the Commission had contended below that the appellant was not an "interested party" because it did not respond to the form B-11 which the Commission sent to the appellant as the last employer when a claim for benefits was filed. This argument of the Commission was rejected by the entire court and the appellant was held to fall within the category of "interested party" notwithstanding its failure to respond to the notice of the filing of the claim for benefits.

With respect to the second point urged by the appellant, however, the justices of the Supreme Court of New Jersey were divided. Three justices held that the statute was to be constructed so as to permit the Commission to substitute for notice "of the decision", a notice merely of the filing of the claim for benefits. The statute was sustained in spite of a construction which permitted the Commission to withhold completely from the appellant any notice that a claim for benefits had been sustained and charged against

the appellant. Under this construction the appellant was deprived of any notice of the decision. This construction permitted the Commission to pay benefits to the claimants and to charge the appellant's account without giving to the appellant an opportunity to be heard either before the decision of the deputy was made, or after. By construing the statute so as to permit the elimination of the notice of the decision the court destroyed the right to appeal, the only statutory procedure which gave to the appellant an opportunity to be heard upon the validity of the claim for benefits.

Examination of the very quotations which the respondent has copied from briefs submitted to the Supreme Court of New Jersey will show that the appellant contended in the courts of New Jersey that the statute was constitutional only if it were so construed as to make it mandatory upon the deputy to notify the appellant of the decision upon the claim for benefits. In the quotation which appears on page 8 of the statement opposing jurisdiction, it was said by Horsman Dolls that the statute was not attacked only if the deputy was required to give the notice of the decision which the statute provided. The majority below did not so construe the statute. On the contrary it was held that under the statute the deputy was not required to notify the appellant of the decision and could instead substitute for the notice of decision a notice which was extra the statute. Such a construction renders the statute unconstitutional and this point was made in the courts below. It was squarely raised and decided.

We have previously quoted the language of the majority below on the due process questions which were raised by

all of the payments had long since been made. Under the statute, the deputy was required to promptly notify the employer of the decision. The statute provided that the employer had a right to appeal with seven days after receiving the notice and before the benefits were paid; the appeal stayed the payment of benefits. This right of appeal after the prompt notice of the decision, was the only appeal which the statute afforded. Under the construction of the statute adopted by the state court the deputy was permitted to destroy this right of appeal by withholding a notice of the decision and substituting instead the notice of the filing of the claim for benefits, from which no right of appeal existed.

It is said by the appellee that there was no denial of due process because the appellant was not injured by the failure to be promptly notified of the decision. It is contended also that the appellant could have taken an appeal after November 19, 1943, when the Commission inserted into the record as an exhibit information relating to the benefits which had been paid years before. The position of the appellee on these points was sustained by the majority. The Court said: "The definitive inquiry is whether plaintiff suffered prejudice by the failure of prompt notice of the allowance of the claims for benefits." 7 N. J. 551.

The appellant consistently argued that its failure to be notified of the decision and the consequent destruction of its opportunity to be heard by taking an appeal from the decision was itself the harm which constituted a deprivation of due process under the Constitution of the United States. In support of this argument the appellant relied upon *Morgan* v. *United States*, 298 U. S. 468 (1936), in which this court rejected an order of the Secretary of Agri-

culture made without compliance with the requirements of due process, notwithstanding the fact that upon examination of a voluminous record it was found that the order was in accordance with the weight of the evidence. *Morgan* v. *United States,* 8 F. Supp. 766, 768, 770 (1934). This court said, however, that when a hearing required by due process was denied, sufficient harm had been shown. "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order." 298 U. S. 181. The same result was obtained in *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927), where a statute of New Jersey was held to violate due process for want of a provision for notice, notwithstanding the fact that the defendant in the case had actual notice of the pendency of a suit against him, the same notice he would have received had provision therefor been made in the statute. This position of the appellant has been sustained in the courts of other states.

Bell-Brook Dairies, Inc. v. *Bryant,* 35 Cal. (2d) 404, 218 P. (2d) 1 (1950);
Juster Bros. v. *Christgau,* 214 Minn. 108, 7 N. W. (2d) 500 (1943);
Babb et al. v. *Bullet,* 210 Ky. 211, 220 S. W. (2d) 394 (1949).

The loss of the right of appeal was a real injury and a real deprivation of due process for with it went the only opportunity to be heard which the appellant could obtain. Only on an appeal was there an adversary proceeding in which the claimant was required to sustain the burden of establishing the validity of his claim. As the minority opinion below pointed out, the effect of permitting the Commission to eliminate the notice of decision and to make the

validity of the claim for benefits depend upon disqualifying causes supplied by the employer was to shift from the Commission to the employer the burden of determining eligibility. 7 N. J. 555.

The argument by the Commission that an appeal could have been taken by the appellant in 1943 after it was supplied with information concerning the benefit payments overlooks the fact that the statute provides for an appeal within 7 days after notice of the decision and before the benefits are paid. Once the benefits were paid, the availability to the appellant of the administrative tribunal was lost. As the dissenting opinion pointed out, "The Commission was not authorized to pay benefits until such notice had been given and the designated period for appeal had elapsed". 7 N. J. 553. The salutory reason for the statutory requirement that no benefits be paid until the time for appeal had elapsed was to maintain the incentive of the employee to establish his eligibility to benefits. With the payment of the benefits to the claimant, this incentive to establish his right to payments was destroyed.

The majority of the court below said that the several years delay in advising the appellant of the particular benefits paid merely delayed the right of appeal, and that the decision of the deputy was not "final if such notification is not given". 7 N. J. 548.

But if the decision of the deputy was not "final" there was no justification for either the payment of the benefits or the charge to the appellant's account. Yet both were done years before November 1943 when the information on benefit claims was put into the record in the hearings be-

fore the referee. And the Supreme Court of New Jersey passed by the statutory requirement that the notification of the decision was to be "promptly" given. To construe the statute so as to permit data produced as an exhibit in a cause years after the decision to be a prompt notice, when the notice was essential to a timely opportunity to be heard, violated the appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States. The opportunity to be heard must be timely in order to satisfy the elements of due process. *Opp Cotton Mills* v. *Administrator, supra.*

The only administrative remedy which was available to the appellant in 1943 was that remedy which it took and on the basis of which it is now before this court. This very proceeding was initiated upon a form supplied by the Commission itself to the appellant for the purpose of obtaining a review of the charges against its account (R10a). Certainly, no action in any tribunal could have been taken by the appellant when it received the form B-11 (Notice of application for benefits) for this form was extra the statute and there was no method by which an appeal or any other action in respect thereof could be taken.

Finally, the point is made by the appellee that estoppel and *laches,* non-Federal grounds, bar the jurisdiction of this court. These principles appear in the final paragraph of the opinion by the majority after its extended discussion of the due process issues. The court said that the failure of the appellant to make known to the Commission grounds for disqualification led the Commission to make benefit payments, and the appellant could not, therefore, complain. Since the appellant's records never disclosed any

reason to disqualify the claimants, for the appellant to have supplied disqualifying information would have required it to falsify its records. It is nowhere suggested that estoppel and *laches* bar the constitutional issue of weekly determinations or the appellant's right to be heard upon the benefit payments subsequent to the filing of the initial claim for benefits and the mailing of the B-11 to the employer. The record is clear that no B-11 was sent by the Commission after the first weekly benefit payment was made (R67a).

But the absence of disqualifying causes within the knowledge of the employer was not the test of eligibility of the claimant for benefits. If it were, then the statutory provisions which required the deputy to investigate and find the facts and to make a decision thereon contained useless statutory language. As the dissenting opinion notes, there were many reasons under the statute for eligibility and disqualification which the employer could not possibly know without an independent investigation of the facts completely apart from the employment. 7 N. J. 554. But this duty of investigation was specifically imposed upon the deputy by the statute. To suggest that the appellant is barred by *laches* and estoppel predicated upon its failure to supply information which it never possessed is artificial and illusory. The court permitted the Commission to take advantage of its own failure to comply with the statute, even in face of the fact that in the first few months of the statute the commission did notify employers that a determination of eligibility had in fact been made. 7 N. J. 554. This change in procedure by the Commission, without any statutory warrant, is now

used as a basis for estoppel and to support the construction of the statute which the court below has made. This court has rejected similar arguments. *Moser* v. *U. S.*, 341 U. S. 41 (1951).

This court may always examine to see if a non-Federal ground asserted to bar this court's jurisdiction is illusory.

> "It is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support." *Ward* v. *Love County*, 253 U. S. 17, 22 (1920).

Where the non-Federal ground is unsubstantial this court will take jurisdiction. *Williams* v. *Kaiser*, 323 U. S. 471, 478 (1945). *Abie State Bank* v. *Bryan*, 282 U. S. 765 (1931).

The denial to the appellant of a hearing or an opportunity to be heard presents in this case a substantial Federal question over which this court has jurisdiction and which it is bound to consider.

Respectfully submitted,

Samuel Kaufman

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Office-Supreme Court,
FILED
OCT 23 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY, AND BRIEF IN SUPPORT OF PETITION.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Horsman Dolls, Inc., a corporation of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey reversing a judgment of the Appellate Division of the Superior Court of New Jersey.

Summary Statement of the Matter Involved.

In January 1943 the petitioner was notified by the Unemployment Compensation Commission of New Jersey that it had fixed a contribution rate of 3.6% for petitioner for the year 1942. This rate, the highest possible, was

unemployment benefits according to the records of the Commission, more unemployment compensation benefits had been paid to former employees of petitioner than the total amount contributed to the unemployment compensation fund by the petitioner. The year that was the first year after of contribution was governed by past employment experience. Prior to that time the rate for all employers in New Jersey was uniform.

The petitioner filed a petition with the Unemployment Compensation Commission seeking a redetermination of its rate (R. 2b). The petitioner contended that the rate had been illegally fixed because the Commission had charged benefit payments against the petitioner although the petitioner never had an opportunity to be heard upon the validity of the claim for benefits. The petitioner charged that under R. S. 43:21-7(b) (Supp. p. 1a) the deputy of the Commission was required to investigate the claim for benefits, find the facts thereon, and notify the petitioner of his decision. The statute contained no provision for an employer to be heard prior to the decision of the deputy, but did provide that an appeal from the decision could be taken by an employer within 7 days after receipt of the notice of the decision. The appeal would stay the payment of benefits and the charge to the employer's account.

The petitioner contended that it was denied due process under the Fourteenth Amendment to the United States Constitution because (a) no decision had ever been made by the deputy; (b) the deputy had made an unconstitutional delegation to subordinates within his department of the duty imposed upon him by the statute to investigate and find the facts and to render a decision upon the validity of the claim; (c) the deputy never notified the petitioner of a decision upon the claim for benefits; (d) the failure of

Questions Presented.

1. Did the failure of the deputy of the Unemployment Compensation Commission of New Jersey to make a decision or initial determination upon claims for benefits filed by former employees of the petitioner as required by the New Jersey statute, deprive the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Did the action of the Unemployment Compensation Commission of New Jersey in charging the petitioner's account with benefit payments without compliance with the Unemployment Compensation law of New Jersey, and without previous notice to the petitioner of a decision and an opportunity to be heard thereon, deprive the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

3. The New Jersey statute provided that the petitioner was entitled to receive notice of the decision of the deputy and that the appeal from such decision was to be taken after the receipt of notice. Was the action of the Unemployment Compensation Commission of New Jersey in failing to send the petitioner notice of the decision and in substituting therefor a notice of the filing of a claim for benefits—a notice not provided for in the statute and from which there was no statutory right of appeal—an unconstitutional deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Does the New Jersey statute as construed by the Supreme Court of New Jersey to allow the substitution of a notice of the filing of a claim for benefits for the statutory

notice of decision deprive the petitioner of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Where the statute of New Jersey required the deputy to examine into and find the facts and render a decision on the basis of the facts found by him, was there an unconstitutional delegation of these duties?

6. Was the action of the Commission in charging petitioner as a base year employer for benefits paid without any notice to petitioner either of the filing of the claim for benefits or of the decision thereon a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Reasons for Allowance of the Writ.

1. The petitioner was entitled to an opportunity to be heard upon the validity of the claim for benefits at some stage in the proceedings. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941). The only statutory provision for such a hearing was an appeal from the decision of the deputy to be taken within 7 days of the receipt by the petitioner of the notice of the decision. The Commission failed to send petitioner notice of the decision, but nevertheless benefits were paid to the claimants and charged against petitioner. The petitioner lost its right of appeal and its right of an opportunity to be heard by the failure of the Commission to comply with the statute.

2. The statute directed that the deputy of the Commission should investigate the facts relating to the claim for benefits and, on the basis of the facts found by him, make a decision upon the validity of the claim. The dele-

gation by the deputy of all of these duties was a denial of due process. *Morgan* v. *U. S.*, 298 U. S. 468 (1936).

3. The payment of benefits immediately created a charge against the petitioner. The statute provides that the benefits were not to be paid until the petitioner had an opportunity to be heard on the validity of the benefit claim. The Commission substituted a notice of the filing of a claim for the statutory notice of the decision thereon, although there was no provision in the statute for the substituted notice and no right of appeal therefrom. The court construed the statute so as to permit this substituted notice to serve as an appropriate opportunity to be heard. As so construed, the statute is unconstitutional. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1927).

4. Unless this court grants certiorari, the petitioner will have been charged with benefits paid to its former employees without ever having had an opportunity to be heard upon the validity of the payments before the money was paid and before the charge was made against its account. Such a result would be contrary to applicable decisions of this court.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of New Jersey demanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings therein and that the judgment of the Supreme Court of New Jersey be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Court may seem just.

SAMUEL KAUFMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the Unemployment Compensation Commission appears in the record at page 19a. The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 9 N. J. Super. 101. The majority and minority opinions of the Supreme Court of New Jersey are reported in 7 N. J. 541 (Advance Sheets dated September 3, 1951).

Specification of Errors.

The Supreme Court of New Jersey erred

1. In holding that the failure of the Commission to comply with the unemployment compensation statute did not unconstitutionally deprive the petitioner of its opportunity to be heard and did not prejudice the petitioner.

2. In holding that the failure of the Commission to notify the petitioner of the decision of the deputy, as required by statute, did not deprive the petitioner of its right of appeal and of its opportunity to be heard.

3. In holding that a notice substituted by the Commission for the statutory notice of decision was appropriate to satisfy the requirement of an opportunity to be heard within the Fourteenth Amendment to the Constitution of the United States, although neither the notice nor any appeal therefrom was provided by the statute.

4. In refusing to hold that the delegation by the deputy of the duties specifically imposed upon him by the statute was unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

5. In holding that the statute was to be construed as not to entitle the petitioner to notice of the decision of the deputy. As so construed, the statute is unconstitutional under the Fourteenth Amendment of the Constitution of the United States because the petitioner was then deprived of any opportunity to be heard before the decision of the deputy became effective.

6. In holding that the petitioner received an adequate hearing in 1943 before the Commission itself, whereas this hearing was held long after all of the benefits were paid and the charges made against petitioner's account. The issues raised in that hearing are the same issues now before this court. The right of each claimant to benefit payments was not involved and no claimant was produced to establish his right to the benefits which he had already received.

7. In holding that the petitioner was not entitled to have removed from its account the charges imposed where the petitioner received no notice of any kind from the Commission, not even the notice of the filing of the claim.

8. In holding that the petitioner was barred by estoppel and laches from raising the failure of the Commission to comply with the statute. These grounds are illusory and unsubstantial because they attribute to the petitioner the duty of investigating and finding facts, a duty which the statute imposes upon the Commission.

Statement of the Case.

The petitioner is a subject employer under the New Jersey Unemployment Compensation Law which became effective in 1939. The statute established an unemployment compensation fund to which all employers contribute. Until 1942 the rate of contribution was uniform for all; thereafter it was controlled by the cumulative employment experience of each employer. The vital factors in determining the rate were the benefits paid to claimants and the contributions by the employer. For the years prior to 1942, according to the Commission's records, benefits paid to former employees of the petitioner substantially exceeded its contributions to the fund. In January 1943, petitioner was notified by the Commission that it was assigned the highest rate possible, 3.6% of its annual payroll. The same rate was fixed for the years 1943, 1944 and 1945. By stipulation these rates are also governed by this litigation. The cumulative effect of the charges from 1939 to 1942 is thus of crucial importance.

The statute provides that when a claim for benefits is filed, the deputy shall investigate and on the basis of facts found by him, render a decision upon the validity of the claim. The statute then provides that the deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The Supreme Court of New Jersey has construed the statute so that the petitioner is included within the classification of "interested party".

The employer has 7 days after receipt of the notice of the decision to appeal to a tribunal within the agency. There, for the first time, he receives a hearing at which the claimant must establish his right to benefits. If the

appeal is taken payment of the benefits is stayed. If there is no appeal, benefits are to commence after the expiration of the 7 days and the employer is charged for such payments. Usually the entire charge is against the most recent employer of the claimant, but if the duration of his employment with the most recent employer is short, then a portion of the charge is assessed against prior employers. These prior employers are referred to as "base year" employers.

The statute established a series of eligibility and qualification conditions which the claimant was required to meet in order to be entitled to benefits. It was concerning these conditions that the deputy was required to investigate and find the facts. In summary, the eligibility conditions consisted in the requirements that the claimant be able to and available for work; that he continue to report to an employment office and thus remain in the labor market; that he has been unemployed for two weeks and that he has earned a certain amount of wages during his base year. N. J. R. S. 43:21-4. The causes which will disqualify the claimant from benefits are voluntary cessation from employment without due cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute, and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States. N. J. R. S. 43:21-5. This was the statutory scheme for the years involved in this litigation.

For the first few months in 1939 the Commission sent to all employers, including petitioner, a form B-11 and an accompanying letter advising that a decision had been made (R271a, R277a). In May 1939 the procedure and

the form were changed by the Commission so that thereafter it sent the employers only a notice that a claim for benefits was filed. This notice was sent only to the most recent employer even though charges were assessed as well against employers in the base year. The new form asked the employer to submit any information which he had which would disqualify the claimant (R276a). The petitioner received these forms when it was the most recent employer. It had no knowledge of disqualifying causes and did not respond to the Commission. After the new form was adopted, the petitioner was never notified that a decision had been made upon any benefit claim for which it was charged. This was conceded by the court below.

During the hearings before the referee in 1943 upon the petition to redetermine the contribution rate, the Commission did not produce any form of decision on the benefit claim (R251a). The deputy testified that the decision was the Commission's benefit check which was given to the claimant (R48a). Since the petitioner received no notice of a decision, the check was delivered and payments were made to the claimant without affording to the petitioner the right to appeal and to receive an opportunity to be heard.

In November 1943, at the last hearing before the referee, the Commission offered into evidence a series of statements containing information with respect to each benefit claim for which the petitioner was charged (R249a). These statements were compiled by the Commission from various sources of information within the agency for use as an exhibit in the cause (R3a).

It was established at the hearings that the deputy of the Commission never conducted a hearing at which the petitioner was afforded an opportunity to be heard, that if

there was any examination of the claims, finding of facts or making of decisions, it was done not by the deputy but by subordinates in the department (R42a to R43a; R59a; R263a).

Argument.

1. The payment of unemployment benefits and the charge against the employer involved were concurrent events under the statute. This charge was the taking of property and the petitioner was entitled to be heard before it was made. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941); *Morgan* v. *United States,* 304 U. S. 1 (1938).

The only opportunity to be heard which the statute afforded was by an appeal from the decision of the deputy. Upon this appeal the claimant would be required to establish his right to benefits in a hearing in which the employer could participate. Unless the claimant established the validity of his claim in the appeal tribunal, no payments of benefits could be made to him. The failure of the Commission to promptly notify the petitioner of any decision, as required by the statute, destroyed this right of appeal and destroyed the opportunity of the petitioner to be heard upon the validity of the claim.

The destruction of the hearing afforded on the appeal was of vital importance in this case because the statute made no provision for a hearing prior to the deputy's decision, and none was ever held. The function of the deputy in finding facts and making the decision thereon was quasi-judicial under decisions of this court, *Morgan* v. *United States,* 298 U. S. 468 (1936) and under New Jersey law, *Penna. Railroad Co.* v. *New Jersey State Aviation Com.,* 2 N. J. 64 (1949). Both the majority and minority

opinions in the court below recognized that the deputy in this case exercised quasi-judicial powers. The majority held, however, that when the petitioner was before the agency in 1943 upon its petition for a redetermination of the rate, it was afforded an adequate hearing under due process, as to which there was full appellate review. To support this view, however, the court cites rules of the Supreme Court of New Jersey which were not adopted until September 15, 1948 after the new Constitution of New Jersey became effective. Prior to that time review by writ of certiorari, the writ which was used here to take the case from the Commission, was purely discretionary with the court. *Gallena* v. *Scott,* 1 N. J. 430 (1949).

But the hearing which the petitioner secured in 1943 was not concerned with the validity of each claim for benefits. The issue there presented is the same now before this court: whether the rate charged against the petitioner was fixed without compliance with the statute and without affording due process. In that proceeding not one claimant was produced to substantiate his right to benefits which had been paid to him months and even years previously. For each such claimant the decision under the statute had long become final when no appeal was taken after 7 days from the decision and the benefits were paid. Nor is there involved in this case any question of the recovery from the employees of benefits paid. This is barred by statute. N. J. R. S. 43:21-6(d) and 43:21-6(b)(1).

The purpose of the statutory requirement that the employer charged with the benefit payments receive notice of the decision was to insure the opportunity to be heard on an appeal and thus to guarantee due process under the United States Constitution. The failure of the Commission to send this notice was a deprivation of petitioner's

property without due process of law in violation of the United States Constitution. Other states which have passed on similar questions have held contrary to the decision below. *Juster Bros. Inc.* v. *Christgau,* 214 Minn. 108, 7 N. W. 2d 500 (1943). In *Bell-Brook Dairies, Inc.* v. *Bryant,* 35 Cal. 2d 404, 218 P. 2d 1 (1950), the statutory requirement was notice of the filing of the claim, instead of notice of the decision as provided in the New Jersey statute. The court eliminated benefits charged where there was no compliance with the statute.

2. The court also held that the Commission was justified in substituting for the statutory notice of decision a notice that a claim for benefits had been filed. But this substituted notice was not authorized by any statute and the decision below sustaining the substituted notice as appropriate for due process is contrary to decisions of this court. *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927).

The substituted notice did not provide for any hearing nor was the petitioner notified that the Commission would no longer send a notice of the decision, as directed by statute. The petitioner was entitled to wait for the notice of the decision before it elected whether to appeal and thus obtain a hearing, or to default. *Mullane* v. *Central Hanover B. & T. Co.,* 339 U. S. 306 (1950).

The substituted notice requested the petitioner to respond only if it had any information which might disqualify the claimant (R. 276a). The petitioner had no such information and, therefore, did not respond to the notice as it was not required to do under the very notice itself. This failure to respond is said by the court below to be the basis of estoppel and laches. But the petitioner had no duty to respond and its failure to supply information as to disqualify causes did not *ipso facto* qualify the claimant

for benefits. The duty of finding facts and making the decision imposed by statute on the deputy was not to be eliminated merely because one of the former employers of the claimant knew of no reason to disqualify him from benefits. As the minority opinion below points out, there were many statutory reasons for disqualification which the employer could not be expected to know. Many arose after the separation from employment.

The petitioner never conceded that the benefit payments were valid and the statement to that effect in the majority opinion is not supported by the record. The petitioner conceded only that its own records disclosed no disqualifying causes. This is pointed out in the dissenting opinion. Petitioner never had an opportunity to attack the validity of the benefit claims because it never received a decision thereon from the Commission in the manner which the statute provided. The use of estoppel and laches to support the denial of due process is unsubstantial and inadequate as an independent ground for the decision below. The shift by the Commission in the forms which were used and the elimination of the notice of decision is of itself sufficient to prevent the application of estoppel against the petitioner. *Moser* v. *United States,* 341 U. S. 41 (1951). There was no warning of this change of course and this court will not under such circumstances presume acquiescence in the loss of a fundamental right. *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (1937).

Where petitioner was the employer in the base year of the claimant, charges were made against its account by the Commission without even a notice to the petitioner that a claim for benefits had been filed. The majority opinion in the court below refused to pass upon this obviously invalid procedure because it claimed that the

amount of base year charges involved was not sufficient to change the rate for 1942. The court did not consider the cumulative use of the base year charges and their effect on future years. Nor did it consider the fact that all charges for 1943, 1944 and 1945 were involved in the litigation by stipulation of the parties (R20a). Petitioner is thus required to bear the charges for benefit payments where it did not even have notice of the filing of the claim for benefits.

3. The statutory requirement that there be a decision by the deputy upon the claim for benefits was not followed. The record discloses that benefit payments were made without any such decision being rendered. Efforts of the petitioner to obtain copies of a decision were unsuccessful. The Commission constantly shifted its position with respect to the decision.

The first response of the deputy was that the check given to the claimant was the decision (R48a). Since the employer was never notified of the delivery of benefit checks this argument was dropped. In its brief in the Appellate Division of the Superior Court of New Jersey the Commission contended that the Form B-11, the notice of the filing of the claim, was the decision. This position was abandoned at the oral argument because the B-11 did not contain the elements of the decision which the statute provided. In the Supreme Court of New Jersey the Commission argued that the decision was embraced in an exhibit which was offered into evidence in November, 1943 at the close of the hearings before the Commission's referee. This is the Exhibit P-19 (R289a), which was prepared for the purposes of the hearing (R248a) and contained information compiled from various sources within the Commission (R3a). At the hearing

the deputy testified that this exhibit was not the decision (R253a). The deputy admitted during the hearings that he was unable to produce any decision (R251a).

The failure of the deputy to comply with the statute and render a decision upon the benefit claims charged against the petitioner constituted a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Morgan* v. *U. S.*, 298 U. S. 468 (1936).

4. The decision below sustains the action of the Commission despite the fact that the deputy delegated to subordinates the duty of investigating the claim, finding the facts and making the decision. This delegation was unconstitutional and deprived petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. *Morgan* v. *United States*, 298 U. S. 468 (1936).

Conclusion.

For these reasons it is respectfully submitted that the writ of certiorari should be granted.

Dated October 9, 1951.

Samuel Kaufman

SAMUEL KAUFMAN,
Counsel for Petitioner.

Appendix.

New Jersey Revised Statutes Title 43:21-6(b)*

"(b) Initial determination. A representative designated by the executive director, and hereinafter referred to as a 'deputy', shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

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*This statute has been amended since the beginning of the

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398.

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,
vs.
UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Unemployment Compensation Commission of New Jersey appears in the record at page 19a. The opinion of the Superior Court of New Jersey, Appellate Division, is reported in 9 N. J. Super. 101. The opinion of the Supreme Court of New Jersey, and the dissenting opinion, is reported in 7 N. J. (adv.) 541.

Jurisdiction.

The jurisdictional statement in the petitioner's brief (page 3) does not appear to conform to the requirements of Rule 12 (1) 3rd paragraph. *Southern Power Co.* v. *North Carolina Public Serv. Co.*, 263 U. S. 508, 68 L. ed. 413.

On September 19, 1951, the petitioner herein, secured an Order Allowing Appeal on petition for appeal presented to this Court. After the provisions of Rule 12(2) were complied with, a Statement Opposing Jurisdiction and Motion to Dismiss or Affirm was served on the appellant (petitioner herein) and filed by the appellee (respondent herein) in accordance with Rule 12(3). The appellant invoked the jurisdiction of this Court under Title 28 U. S. C. A. Section 1257(2), contending that N. J. Revised Statutes 43:21-6(b) Appendix herein, p. 21) was repugnant to the Constitution of the United States. This appeal is now pending before this Court.

The petitioner in these proceedings now attempts to invoke the jurisdiction of this Court under Title 28 U. S. C. A. Section 1257(3). The petitioner appears to rely on the contention that N. J. Revised Statutes 43:21-6(b) was improperly administered and as a result the petitioner was deprived of its constitutional rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented.

1. Can the petitioner assert the violation of a constitutional right where its conduct barred relief by reason of laches and estoppel?

2. Can the petitioner assert the violation of a constitutional right without showing harm or injury?

3. Can the petitioner assert the violation of a constitutional right before exhausting the administrative remedies provided by N. J. Revised Statutes 43:21-6(c), (d), (e) and (i)?

Statute Involved.

The pertinent provisions of the Unemployment Compensation Law of New Jersey involved are printed in the Appendix herein, pp. 21-27.

Statement.

The Unemployment Compensation Law, adopted in 1936, imposed a tax upon all subject employers, which was uniform in rate until 1942 (N. J. Revised Statutes 43:21-7(a) and (b)), and directed the payment of benefits during and after 1939 (N. J. Revised Statutes 43:21-3(a)).

In the year 1942 and thereafter, an employer under subsections 7(c)(3) and (4) (Appendix herein, pp. 25-26) after three years of coverage retained his basic rate of 2.7 per cent or was assigned a merit rate of 1.8 per cent or 0.9 per cent, or assigned a penalty rate of 3.6 per cent, depending on his past employment experience.

The contribution rate assigned to the petitioner, Horsman Dolls, Inc., for the year 1942 was 3.6 per cent. In June, 1942, the petitioner received a notice of its contribution rate of 2.7 per cent for the year 1942. On January 8, 1943, an amended notice was mailed to the petitioner showing its rate to be 3.6 per cent for the year 1942, and on January 13, 1943, petitioner through its attorney wrote to the Commission advising it of the receipt of the amended notice and requesting a hearing on the ground that it disagreed with the assigned rate of 3.6 per cent. In answer to this communication, the Commission mailed to the attorney for petitioner, a form of Petition for Hearing which was executed by petitioner on March 9, 1943, and returned to the Commission (R10a-11a). Petitioner set out the following reason for its request for a hearing:

> "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Commission scheduled a hearing to determine the nature and the merits of the petitioner's complaint. It was not until the hearing was considerably in progress that it was revealed that the petitioner wished all benefit charges made to its account (a factor in computing the rate N. J. R. S. 43:21-7(c)(4)) during the years 1939 to 1941, inclusive, erased without being required to first challenge in the tribunals constituted to hear and decide disputed claims for benefits under N. J. Revised Statutes 43:21-6(c), (d), (e) and (i) (Appendix herein, pp. 22-24), the propriety of the benefits paid. Petitioner took this position because it had not received notices of the decisions made by the deputy under subsection 6(b) (R163a-37-40; R232a-5-15; R233a-14-20), and insisted that it be assigned the lowest merit rate of 0.9 per cent.

After protracted litigation on another phase of this case, the Commission made its decision which in substance held: that the Commission did not have the power or right under the statute or under the facts of this case to erase the benefit charges made to the account of petitioner, Horsman Dolls, Inc.; that the petitioner had to exhaust its administrative remedies before the appellate tribunals constituted under N. J. Revised Statutes 43:21-6 which it failed to do; and that the contribution rate assigned to it for 1942 of 3.6 per cent was properly cast.

The Superior Court of New Jersey, Appellate Division, reversed the decision of the Commission, holding that the contribution rate of Horsman Dolls, Inc. for the year 1942, although correctly determined under the statute, was nevertheless invalid because of procedural irregularities in giving

notices to Horsman Dolls, Inc. of benefits allowed to the detached employees of the company during 1939 to 1941, inclusive, and which were paid and charged to its account. The fact that the employer did not dispute the merits of any benefit claims paid by the State was not considered or referred to in the Superior Court's Opinion.

The Supreme Court of New Jersey, resolving the doubt in favor of notice of the deputy's decisions, reversed the decision of the Appellate Division on the grounds that, (1) the petitioner had ample opportunity to challenge in the proper administrative tribunal the validity of the charges to its account, which it had not taken; (2) the petitioner, under the facts, could show no harm or injury; and (3) laches and estoppel in *pais* barred the relief sought by the petitioner.

The facts hereinafter briefly set forth were adduced at the hearing before the Commission.

When an employee of the petitioner was detached from his employment, during 1939 to 1941, inclusive, he reported to the local office of the Employment Service and filed an initial claim for benefits (R73a-30-38; Ex. P-2, R261a). The initial claim for benefits was transmitted to the central office of the Commission in Trenton where the claim was carefully checked against all reports and other information in the possession of the Commission (R74a-30-40; R75a-4-18). Then a "Notice to Employer of Claim for Benefits" (B-11) (Ex. P-9, R272a; Ex. P-14, R281a) was prepared in each instance when the claim was a valid one (claimant had earned $150 or more in his base year) and mailed, in duplicate, to the petitioner when it was the last employer, requesting it, if it had "any objections to payment" of the claim, to check the printed objections on the original and

return it (R57a-5-13; R210a-11-38; R216a-29-40; R218a-24-31; R220a-4-22). The petitioner received the aforementioned notices, but paid no attention to them (R141a-40).

The petitioner did not send separation notices (B-6) to the Commission, required under the latter's regulations when an employer had knowledge of conditions which would disqualify an employee from receiving benefits (Ex. P-16, R284a; R135a-20; Ex. C-1). Petitioner had possession of the regulations (R221a-4-7, 15-18).

The only witness, Robert I. Garnier, produced in behalf of the petitioner, and who was one of its executives, specifically testified as follows:

> "Q. At the last hearing you testified that all communications and notices, particularly from the taxing agencies of the State, are directed to your attention? A. Yes, sir." (R220a-36-40).
>
> "Q. And you also testified that by reason of the practice followed with your company that you received the regulations of the Commission? A. Yes." (R221a-5-8).

And the witness has previously testified as follows:

> "Q. Who took charge of them? A. Of the B-11's?
>
> "Q. Yes. A. Why I will answer this this way: In 1938, 1939 and 1940 I really paid no attention to them." (R132a-3-8).

This witness, Robert I. Garnier, further testified that the petitioner never responded to the B-11's or otherwise communicated with the deputy or the Commission, because the petitioner's business was seasonal in nature and was shut down at certain periods of the year; and that the petitioner had no objection to the payment of benefits because

there was no employment (R141a-40; R142a-5-14). He also testified that he, as the representative of the petitioner, would have known during the years 1939 to 1941, inclusive, whether any of the petitioner's detached employees were not entitled to benefits (R224a-24-32), and that he knew that some of petitioner's detached employees, including his own son, were receiving benefits (R236a-13-40).

When an employer responded to a B-11 or transmitted a separation notice (B-6), a notice of the disposition of the case by the deputy was always mailed to the employer (R100a-25-32; R112a-38-41; R113a-5-28; R147a-22-40; R148a-4-14; Ex. P-13, R279a-280a). The deputy testified that whenever any employer responded to a B-11, the claimant did not receive any checks before the employer was notified of the deputy's action or decision favorable to the claimant and of the employer's right of appeal (R84a-8-21).

The amended notice of experience rate received by petitioner in January, 1943, showed thereon the reasons for the change of its contribution rate. This notice showed that from 1936 to 1941, inclusive, it had paid contributions to the Commission in the sum of $48,929.26 and that benefits paid to its detached employees and charged to its account were in the sum of $98,203.34 (Ex. P-1, R9a, R149a-25-27).

Of the aforementioned benefits charged to the petitioner's account, $3,112.61 was paid to claimants when petitioner was not the last or most recent employer, and the sum of $1,750.76 at one stage of the hearing could not be allocated; however, if the petitioner's account was disburdened of the total ($4,863.37), its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R179a-10-40; R180a-4-10).

Shortly after the transmission of the amended Notice of Employer Contribution Rate for the year 1942 (Ex. P-1, R9a) to petitioner and its request for a hearing thereon, petitioner received a breakdown of the benefit charges, etc., for the years 1939 to 1942, inclusive, on a separate form (B-110) (Ex. P-15, R283a; R143a-37) for each one of its employees who had received benefits during those years. Again, on November 1, 1943, petitioner through its attorney received an individual statement with respect to each benefit claim filed by each one of its detached employees during 1939 to 1941, inclusive, containing all the factors or elements of an "initial determination" and the benefits paid on each claim during those years (Ex. P-19, R281a; R246a-30-40; R247a-4-24; R249a-9-11).

No proof has ever been submitted by the petitioner to show that any detached employee was not entitled to receive his benefits.

ARGUMENT.

The record and briefs below show the petitioner contended, that notwithstanding its own inaction in the face of an excess of notice and although every charge against its account was justified on the merits, its account should not be charged with benefit payments because it did not receive the precise notice directed by N. J. Revised Statutes 6(b), and that this failure *ipso facto* justified the relief it sought.

The issues of Injury and Harm, Estoppel in *pais* and Laches, and Failure to Exhaust Administrative Remedies, were vigorously argued before the Supreme Court of New Jersey. That Court, after resolving the doubt in favor of

notice in line with petitioner's contention, decided every issue, aforementioned, in favor of the respondent. The Court held: that on the facts the petitioner was not injured or damaged (7 N. J. 541, 549, 551); that any delay in notice merely delayed the time within which the petitioner could take an appeal from deputy action (*ibid.* 551); that it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account (*ibid.* 550) (See subsections 6(c), (d) and (e), Appendix herein, pp. 22-23, establishing administrative tribunals to hear appeals from deputy action); and that by reason of laches and estoppel in *pais* the petitioner was barred from the relief it sought (*ibid.* 552). The result reached by the Supreme Court of New Jersey on the facts and the law was inescapable.

The construction of the statute adopted by the Supreme Court of New Jersey and its interpretation of the scope of the law, particularly since it was not in conflict with the petitioner's contention, should be accepted as conclusive. *Osborne* v. *Florida*, 164 U. S. 650, 654; *Farncomb* v. *Denver*, 252 U. S. 7; *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40; *Alton R. Co.* v. *Illinois Commerce Commission*, 305 U. S. 548.

I.

There is no Substantial Federal Question Involved.

Since the decision of the State court rests on adequate and independent state grounds sufficient to support the State court judgment, the petition for a writ of certiorari should be denied.

> *Enterprise Irrigation Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164;

Public Service Commission v. *Wisconsin Telephone Co.*, 309 U. S. 657;
Washington v. *Inland Empire Refineries*, 311 U. S. 713;
Yakus v. *U. S.*, 321 U. S. 414, 444-447;
Herb v. *Pitcairn*, 324 U. S. 117, 125-126;
Phyle v. *Duffy*, 334 U. S. 431, 444;
Hammerstein v. *Superior Court of Cal.*, 341 U. S. 491, 492.

A.

Estoppel in *Pais* and Laches.

From the statement of facts, it is observed that during the years 1939 to 1941, inclusive, the petitioner, (1) conducted a seasonal business requiring the periodic layoff of its employees, (2) received Forms B-11 giving notice of the filing of benefit claims and ignored every one of them, (3) knew of the respondent's regulation requiring separation notices where the employer had knowledge of facts and conditions which would disqualify a benefit claimant, (4) knew that benefits were being paid to its detached employees but made no objections because it knew of none and had no knowledge of any disqualifying factors, (5) at no time after receiving its first notice of contribution rate in June, 1942, or after receiving its amended notice in January, 1943, which notices contained a summary statement of benefits paid, and at no time after receiving detailed or breakdown statements in 1943 covering each benefit claim and the action taken thereon, initiated any administrative appeals to review any benefit allowance, and (6) made no effort or attempt in the hearing before the Commission to impugn or contest the validity or propriety of any benefits paid to any one of its detached employees, assuming that the Commission had authority to inquire into and review such benefit determinations.

A court will refuse its aid to one who remains silent when duty, candor and fair dealing require him to speak out. This principle is predicated upon the neglect of a duty implicit in fairness, candor and ordinary decency. The petitioner takes the position that it is not to be penalized for its silence but rather is entitled to capitalize on it and thereby make itself the recipient of a windfall resulting from the erasure of all the benefits charged to its account and such refund payments as would necessarily follow.

The decision of the Supreme Court of New Jersey upon the ground of estoppel and laches finds full support in the record and is one of the reasons why the Petition should be denied.

Moran v. *Horsky,* 178 U. S. 205, 208 (on laches);
Preston v. *Chicago,* 226 U. S. 447, 450 (on laches);
Wood v. *Chesborough,* 228 U. S. 672, 676-680 (on laches);
Enterprise Irrigation Dist. v. *Farmers' Mut. Canal Co., supra* (on estoppel);
Utley v. *St. Petersburg,* 292 U. S. 106, 111-112 (on estoppel);
McSweeney v. *Equitable Trust Co.,* 127 N. J. L. 299, appeal dismissed 315 U. S. 785 (on estoppel).

In *R. H. Stearns Co.* v. *U. S.* (1933), 291 U. S. 54, this Court said (p. 62):

> "* * * no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. Imperator Realty Co. *v.* Tull, 228 N. Y. 447, 127 N. E. 263, *supra.* A suit may not be built on an omission induced by him who sues. Swain *v.* Seamens, 9 Wall. 254, 274, 19 L. ed. 554, 560; United States *v.* Peck, 102 U. S. 64, 26 L. ed. 46; * * *."

In the case of *Enterprise Irrigation Dist.* v. *Farmers' Mut. Canal Co., supra,* where the non-Federal ground of estoppel in *pais* supported the state court judgment, this Court said (bottom p. 164):

> "* * * where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions."

And similarly, in the case of *Utley* v. *St. Petersburg, supra,* where the non-Federal ground of estoppel and laches supported the state court judgment, this Court said (p. 111):

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following Abell *v.* Boynton, 95 Fla. 984, 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rests upon a non-federal ground broad enough to support it."

B.

Harm and Injury.

The benefits paid to the petitioner's detached employees, resulting in the charges made to the petitioner's account, were justified on the merits. The seasonal nature of its business compelled periodic layoffs, and there were no objections or reasons for disqualification which the petitioner could advance. The petitioner has taken the position that

the mere failure to receive the precise statutory notice constituted sufficient harm and injury to entitle it to relief. The Supreme Court of New Jersey held that to be entitled to relief the petitioner must make a demonstration of material or substantial harm or injury by reason of such failure. Since the decision of the State court also rested on this adequate and independent State ground sufficient to support the State court judgment, the Petition should be denied.

> *Lewis* v. *Reynolds*, 284 U. S. 281;
> *R. H. Stearns Co.* v. *U. S.*, *supra;*
> *U. S.* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386;
> *Peoples Banking Co.* v. *Sterling*, 300 U. S. 175, 184;
> *Stone* v. *White*, 301 U. S. 532;
> *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 301.

In the case of *Peoples Banking Co.* v. *Sterling, supra,* with respect to the burden cast on a litigant who claims himself harmed through the operation of a statute, the Court said (p. 184):

> "* * * At all events, the burden was on the appellants to show themselves harmed through the operation of the statute challenged as unlawful. Premier-Pabst Sales Co. *v.* Grosscup, 298 U. S. 226, 227, 80 L. ed. 1155, 1156, 56 S. Ct. 754; New York ex rel. Hatch *v.* Reardon, 204 U. S. 152, 160, 161, 51 L. ed. 415, 422, 423, 27 S. Ct. 188, 9 Ann. Cas. 736."

The relief which the petitioner sought in the State court proceedings was a refund of taxes through a reduction of its contribution rate. The contributions payable under the Unemployment Compensation Law of New Jersey are taxes. *Singer Sewing Machine Co.* v. *N. J. Unemployment Compensation Commission* (E. & A., 1943), 128 N. J. L. 611, 619, aff'd 130 N. J. L. 173. A suit for refund of taxes is in

the nature of an action in assumpsit, for money had and received, and a plaintiff in such suit may recover only if he shows that more taxes have been paid than in equity and good conscience should be retained by the collecting agency. *Stone* v. *White, supra; Lewis* v. *Reynolds, supra;* and this rule applies even when the action is provided by statute. *U. S.* v. *Jefferson Elec. Mfg. Co., supra.*

With respect to the charges ($4,863.37) made to the petitioner's account when it was the base year employer, the record shows that if all such charges were actually erased from its account, its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R179a-10-40; R180a-4-10). The petitioner's contention that while these charges were not critical with respect to the rate for 1942 they might become critical with respect to the determination of the petitioner's rate at some undefined time in the future, is founded on mere conjecture and is untenable. *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295.

In the case of *Gange Lumber Co.* v. *Rowley, supra,* the plaintiff's tax rate depended in part on the benefits paid to its employees under the provisions of the Workmen's Compensation Law of Washington. The company argued that an amendment to the Law which operated to revive the barred right of an employee to seek an additional award of workmen's compensation would affect its future rate. The Court in rejecting this contention said (p. 305):

> "In sum, all that the record discloses is that this amount will be charged against the appellant's experience and taken into account with other factors, as the statute requires, in the computation for some future period, with possibly some increase resulting in the rate. But, in the absence of all evidence showing the facts concerning the other factors, it is en-

tirely problematical whether an increase will follow or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant. *This being so, appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future.*" (Italics ours).

C.

Failure to Exhaust Administrative Remedies.

The casting of contribution rates is a mandatory administrative function under the provisions of subsections 7(c)(3), (4) and (5) of the statute (Appendix herein, pp. 25-26).* The consideration and determination of benefit rights to disemployed individuals is solely within the jurisdiction of the deputy and the tribunals constituted under the provisions of N. J. Revised Statutes 6(b), (c), (d) and (e) (Appendix herein, pp. 21-23). N. J. Revised Statutes 43:21-10(d) directed the appointment of "a board of review, consisting of three members whose duties shall be to act as a final appeals board in cases of dispute and to whom shall be delegated the duty of supervising the work of local appeal tribunals to be organized as provided for elsewhere in this chapter." The Commission has no power to determine or review, the propriety or validity of any decisions of the deputy, the appeal tribunals or the Board of Review, respecting benefit payments upon which charges to an em-

---

* The factors of the formula which determined an employer's contribution rate were:

(1) The period of coverage of an employer (7(c)(3));

(2) The relationship between the balance (contributions less benefits) in an employer's account and his average annual payroll (7(c)(4)); and

(3) The relationship between the total assets of the fund and the total benefits paid from the fund within the last preceding calendar year (7(c)(5)).

ployer's account are based. *Henry A. Dreer, Inc.* v. *Unemployment &c. Com.*, 127 N. J. L. 150, 151 (N. J. Sup. Ct., 1941). See also, *American Grocery Co.* v. *A & W Wine &c. Corp.*, 131 N. J. L. 383 (N. J. Sup. Ct., 1944). The powers of the Commission under subsection 7(c) and the powers of the tribunals under section 6 are separate and distinct.

It is apparent that the petitioner not only failed to exhaust adequate administrative remedies provided by the State statute, but refrained and refused to avail itself of such remedies. This is another independent State ground sufficient to support the State court judgment, and another reason why the Petition should be denied.

Mellon Co. v. *McCafferty*, 239 U. S. 134, 136;
First Nat. Bank v. *Weld County*, 264 U. S. 450, 453-456;
Utley v. *St. Petersburg, supra;*
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51;
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125;
Yakus v. *U. S., supra;*
U. S. v. *Ruzicka*, 329 U. S. 287, 290, 294-295;
Lichter v. *U. S.*, 334 U. S. 742, 790-792;
Slocum v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

In the case of *First Nat. Bank* v. *Weld County, supra*, this Court, after quoting a part of the opinion of the Supreme Court of Colorado which construed the remedies provided for in a Colorado tax statute that were not exhausted by the plaintiff in that case, said (p. 454):

> "The effect of this is to hold that an administrative remedy was in fact open to plaintiff under the statutes of the state, and by this construction, upon well-settled principles, we are bound. (Citations)."

The principle which is followed with respect to the exhaustion of administrative remedies, is clearly set out in the case of *Yakus* v. *United States, supra* (p. 444):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil *v.* Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour *v.* Georgia, 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney *v.* California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken."

In the tax case of *Mellon Co.* v. *McCafferty, supra,* wherein the administrative remedies provided by law were not followed, this Court said (pp. 138, 139):

> "* * * To avoid this difficulty in the argument it is insisted that a resort to these remedies was not required because they would have been unavailing, in view of the nature of the wrong complained of. But the duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified."

The Petitioner's Citations.

The petitioner asserts (Petition, p. 14) that "other states which have passed on similar questions have held contrary to the decision below." Citing, *Juster Bros., Inc.* v. *Christgau,* 214 Minn. 108, and *Bell-Brook Dairies, Inc.* v. *Bryant,* 35 Cal. (2d) 404. The construction of the statute

of each state is of course left to the courts of each particular state; however, an examination of the aforementioned cases shows that they are dissimilar.

In both cases no notices of claims for benefits were given at any time to the employers involved,—in the *Bell-Brook* case because of pressure of work and lack of personnel in the California agency, in the *Juster Bros., Inc.* case because the agency had not received separation notices from the employer. The employer in each case was not barred by estoppel and laches because it never knew that claims had been filed or that benefits were paid. Furthermore, it is to be noted that in each case the employer invoked and exhausted the administrative remedies provided by the State statute.

The petitioner relies on *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, and *Morgan* v. *United States,* 304 U. S. 1, to support its Petition (pp. 12, 17). As a matter of fact, these cases support the position of the respondent rather than that of the petitioner. Administrative remedies were available to petitioner, but it refrained and refused to avail itself of such remedies. The petitioner could have secured a full and complete hearing on all benefit allowances before the tribunals constituted under section 6 of the statute.

The case of *Wuchter* v. *Pizzutti,* 276 U. S. 13 (Petition, p. 14), involves a statute void because it failed to provide for the giving of notice of process in a judicial proceeding instituted against a non-resident defendant-user of a state highway and is not in point.

The case of *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (Petition, p. 15) is not pertinent. In this case, the Utilities Commission determined value of the

utility company's system without reference to any evidence in the record before it and "upon proofs drawn from the clouds." Since there was no warning that the Utilities Commission would not rely on the evidence of value of property adduced before it, the Court held that it would not presume acquiescence or consent to the course taken by the Commission.

In *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306 (Petition, p. 14), the company, after filing its petition for judicial settlement of its accounts covering small trust estates pooled into one common fund for investment administration under a New York statute, gave notice only by publication in a local newspaper as prescribed by the statute. Said notice set forth only the name and address of the trust company, the name and date of the establishment of the common trust fund and a list of the participating estates. The known beneficiaries of the separate trusts never received any direct notice nor had any way of knowing by the published notice that they were affected. This Court held that the prescribed statutory notice by publication was insufficient as to the known beneficiaries.

The petitioner suggests, citing *Moser* v. *United States*, 341 U. S. 41 (Petition, p. 15), that there was a shift in the forms used by the deputy whereby it was prejudiced. This assertion disregards the facts which form the basis of the non-Federal grounds of decision and which for expediency will not be repeated or referred to here. The *Moser* case involved unusual circumstances. In that case this Court held that a Swiss citizen did not waive his right to become an American citizen under the Selective Training and Service Act where his application for exemption from military service was on a form which, pursuant to negotiations be-

tween the Swiss Legation and the State Department, did not contain the usual formal waiver of the signer's rights of citizenship and was signed only after the Swiss Legation had advised him that he thereby did not waive his right to apply for American citizenship.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 9, 1951.

APPENDIX.

From Unemployment Compensation Law
Reprint of June 2, 1941.

Claims for Benefits.

N. J. Revised Statutes.

43:21-6. (a) Filing.—Claims for benefits shall be made in accordance with such regulations as the commission may approve. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial determination.—A representative designated by the executive director, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit

to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; *provided,* that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal tribunals.—To hear and decide disputed claims, the executive director with the approval of the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman,

one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than twenty dollars ($20.00) per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The executive director may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Board of review.—The board of review may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The board of review shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous and by the deputy whose decision has been overruled or modified by an appeal tribunal. The board of review may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the board of review shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The board of review shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings

and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness fees.—* * *

(h) Appeal to courts.—* * *

(i) Court review.—Within ten days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review thereof by writ of certiorari directed to the board of review, in which action any other party to the proceeding before the board of review shall be made a defendant.

CONTRIBUTIONS.

43:21-7(a) * * *

(b) * * *

(c) Future rates based on benefit experience: (1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf. But nothing in this chapter shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged against the account of his most recent employers against whose accounts the maximum charges hereunder have not previously been made in the inverse

chronological order in which the employment of such individual occurred, but the maximum amount so charged shall not exceed one-sixth of the wages payable to such individual by each such employer for employment on and after the first day of the nine completed calendar quarters immediately preceding such individual's benefit year, or two hundred forty dollars ($240.00), whichever is the lesser, but this provision shall not be construed to limit the duration of benefits payable pursuant to subsection (d) of section 43:21-3 of this title. The commission shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment during the same week.

(2) The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

(3) Each employer's rate shall be two and seven-tenths per centum (2 7/10%), except as otherwise provided in the following provisions. No employer's rate shall be less than two and seven-tenths per centum (2 7/10%) unless and until there shall have been three calendar years throughout which any individual in his employ could have received benefits if eligible.

(4) Each employer's rate for the twelve months commencing January first of any calendar year shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar

year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his account for all such years, his contribution rate shall be:

(A) One and eight-tenths per centum (1 8/10%), if such excess equals or exceeds seven and one-half per centum (7½%), but is less than ten per centum (10%) of his average annual payroll (as defined in paragraph (2) subsection (a) of section 43:21-19 of this title);

(B) Nine-tenths of one per centum (9/10 of 1%), if such excess equals or exceeds ten per centum (10%) of his average annual payroll.

If the total of his contributions, paid on his own behalf for all past periods or for the past one hundred and twenty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum (3 6/10%).

(5) No employer's rate for the period of twelve months commencing January first of any calendar year shall be less than two and seven-tenths per centum (2 7/10%) unless the total assets of the fund, excluding contributions not yet paid at the beginning of such calendar year, exceed the total benefits paid from the fund within the last preceding calendar year; and no employer's rate shall be less than one and eight-tenths per centum (1 8/10%) unless such assets at such time were at least twice the total benefits paid from the fund within such last preceding year.

Appendix.

BENEFIT ELIGIBILITY CONDITIONS.

43:21-4. An individual, totally or partially unemployed, shall be eligible to receive benefits with respect to any week only if it appears that:

(a) * * *

(b) * * *

(c) * * *

(d) * * *

(e) He has within his base year earned wages of not less than one hundred fifty dollars ($150.00). (As amended by chapter 114, P. L. 1941. Effective May 19, 1941)

DEFINITIONS.

43:21-19. As used in this chapter, unless the context clearly requires otherwise:

(a) * * *

(b) * * *

(c) * * *

(d) * * * Any claim for benefits made in accordance with section six (a) of this act shall be deemed to be a "valid claim" for the purposes of this subsection if the individual has fulfilled the condition imposed by section four (e).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398.

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF OF PETITIONER.

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF FOR PETITIONER.

Respondent's statement that the jurisdictional statement of the petitioner does not appear to conform to requirements of the third paragraph of Rule 12 (1) is in error.

As noted in the petition, there has already been filed with this Court and allowed by the Court an appeal from the judgment of the Supreme Court of New Jersey. With that appeal there was filed the jurisdictional statement required by Rule 12. Petitioner was informed by the Clerk of this Court that its petition for a writ of certiorari would

be docketed in the appeal and that another statement of jurisdiction repeating the same facts was unnecessary under the circumstances. In any event, however, the matters required to be contained in a statement of jurisdiction do appear in the petition beginning with the section entitled "Summary Statement of the Matters Involved."

A.

Estoppel and Laches.

It is argued by the respondent that there was no substantial federal question involved because the decision of the Supreme Court of New Jersey is based upon non-federal grounds which are adequate to support the judgment. Respondent contends that included in these grounds are the doctrines of estoppel and laches.

In its brief in support of the petition for writ of certiorari (page 14), the petitioner pointed out that the argument of estoppel was predicated upon the fact that the petitioner did not respond to the Form B-11 which the Commission sent to most recent employers when a claim for benefits was filed. It was pointed out by the petitioner, as the majority of the Court below indicated in the opinion, that this form was "extra the statute". Petitioner met this argument in its main brief by showing that most of the disqualifying reasons provided by the statute were not within the petitioner's knowledge as a former employer of the claimant. By the very terms of the Form B-11 petitioner was not obligated to complete the form and return it to the Commission. In addition, the petitioner's records

disclosed no reason to disqualify the claimants who were its former employees. This was further support for its treatment of the B-11 as the simple inquiry which it was. What the Commission has done, with the apparent approval of the majority below, is to predicate the eligibility of the claimant for benefits upon the fact that the petitioner did not return the Form B-11 and upon this fact alone, for there is no proof in the record of any decision being made by the Deputy in any case where a claim for benefits was filed. This point is adequately demonstrated in the minority opinion.

The B-11 contained no warning that failure to answer would result in petitioner's not receiving the statutory notice of decision with right of appeal thereon. Loss of constitutional rights cannot be sanctioned by such a trap.

B.

Harm and Injury.

It is said by the respondent that the benefits paid to the petitioner's former employees "were justified on the merits" (Respondent's brief, page 12). There is no proof in the record to support this statement. There is no proof that the claimants were eligible for benefits or that they were not disqualified from receiving benefits within the statutory provisions previously discussed (Main brief, page 10). No proof of any decision made by the Deputy establishing the validity of the claim for benefits charged against the petitioner's account was ever produced, although repeated requests therefor were made by the petitioner during the course of the hearings before the Commission. The

payment of the benefits to the claimants completely foreclosed under the statute any opportunity to the employer to ascertain in an adversary proceeding whether or not the claimants did and could sustain the burden of establishing their right to benefits. In our main brief we pointed to the cases which hold that where due process is denied, there is sufficient harm to justify the reversal of state action.

C.

The Exhaustion of Administrative Remedies.

The doctrine which bars an appeal to the courts for failure to exhaust administrative remedies is directed to the case where the highest unit of an agency having jurisdiction has had no opportunity to pass upon the issues. *Myers* v. *Bethlehem Steel Corp.*, 303 U. S. 41 (1938). In the instant case the decision was made by the Unemployment Compensation Commission itself, from which there is no appeal except to the courts. The attack upon the contribution rate imposed by the Commission against the petitioner was made upon the very form supplied by the Commission for the purpose. It was the Commission which directed that the case before it be tried before one of its referees (R12a). It was the Commission which, at the close of the hearing before the Referee, withdrew the case from the Referee to itself for decision (R13a). The New Jersey Court of Errors and Appeals, which sustained the action of the Commission in another phase of this case, specifically held that the determination of whether there should be an adjustment or refund to the petitioner in this case was a matter

which was exclusively vested in the Commission or its executive director. *Horsman Dolls, Inc.* v. *Unemployment Compensation Commission,* 134 N. J. L. 77 at 79 (E. & A., 1946).

The asserted non-federal grounds by which the respondent seeks to prevent a hearing upon the substantial constitutional issues are illusory and inadequate. The failure of the petitioner to answer a form used by the Commission for which there is no statutory warrant and which, according to its terms, did not require an answer from the petitioner, is now asserted by the respondent as a basis for denying notice and hearing. The petitioner's submission to a hearing before the Commission upon the Commission's own form of pleadings, and the Commission's own action in deciding the case now before this Court is asserted by the respondent Commission as a failure to exhaust administrative remedies. This procedure which the Commission adopted and which it directed the petitioner to follow received the approval of the New Jersey Court of Errors and Appeals. Nevertheless, it is now used by the respondent in an effort to entrap the petitioner in the loss of its constitutional rights.

This Court will not permit such an entrapment to be used as a ground for denying review.

> "It is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."
>
> *Ward* v. *Love County,* 253 U. S. 17, 22 (1920).

Where the non-federal ground is unsubstantial, this Court will take jurisdiction. *Williams* v. *Kaiser*, 323 U. S. 471 (1945). *Abie State Bank* v. *Bryan*, 282 U. S. 765 (1931).

The denial to the petitioner of a hearing or an opportunity to be heard presents in this case substantial Federal questions over which this Court has jurisdiction and which it is bound to consider.

Respectfully submitted,

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